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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether documents submitted by private citizens in response to a request by a government official for comment on proposed rules qualify as "inter-agency or intra-agency memorandums or letters" exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5).

RULE 29.6 STATEMENT

The National Institute of Military Justice ("NIMJ") states that it has no parent companies, nor does any publicly-held company have a 10% or greater ownership interest in NIMJ.

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PETITION FOR A WRIT OF CERTIORARI

The National Institute of Military Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 512 F.3d 677. The opinion of the district court (App., *infra*, 41a-87a) is reported at 404 F. Supp. 2d 325.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2008. A timely petition for rehearing and rehearing en banc was filed on February 25, 2008, and was denied on April 30, 2008. App., *infra*, 88a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552 provides, in relevant part:

> (a) Each agency shall make available to the public information as follows:
>
> * * *
>
> (3)(A) * * * [E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * *
>
> (b) This section does not apply to matters that are –

* * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

Exemption 5 of the Freedom of Information Act is limited to "***inter-agency or intra-agency memorandums or letters*** which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (emphasis added). In *Department of the Interior* v. *Klamath Water Users Protective Association*, 532 U.S. 1 (2001), this Court held that the "inter-agency or intra-agency" requirement should not be "drain[ed] * * * of independent vitality," rejecting the argument that "'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." *Id.* at 12.

Notwithstanding this Court's clear statements in *Klamath*, the court of appeals majority held that documents written by private citizens and submitted by them to the government qualified as "inter-agency or intra-agency" as long as there are "some indicia of a consultant relationship between the outsider and the agency"—even if those indicia consist solely of a request by a government official for the private citizen's views. App., *infra*, 19a. As Judge Tatel explained in dissent, the majority's ruling "does exactly what the Supreme Court forbade in * * * [*Klamath*]: it makes 'intra-agency' . . . a purely conclusory term." App., *infra*, 23a.

The decision below does not just flagrantly disregard this Court's analysis in *Klamath*; it also creates confusion among the lower courts regarding the appropriate test for determining whether a document

qualifies for protection under Exemption 5, an issue that arises with some frequency. Review by this Court is plainly warranted.

A. The FOIA Request

1. The Freedom of Information Act, 5 U.S.C. § 552, provides broadly for disclosure of government documents upon request unless the documents fall within specific exceptions to the disclosure obligation. "[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of the Air Force* v. *Rose*, 425 U.S. 352, 361 (1976). Thus, "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given narrow compass." *Dep't of Justice* v. *Tax Analysts*, 492 U.S. 136, 151 (1989).

This case involves the scope of Exemption 5, which allows the government to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Most decisions construing Exemption 5 have focused on the provision's second condition, whether particular agency documents were protected by a civil discovery privilege. This case involves the first condition, whether a document qualifies as "inter-agency or intra-agency."

The Court addressed that issue in *Klamath*, recognizing that "the first condition of Exemption 5 is no less important than the second; the communication must be 'inter-agency or intra-agency.'" 532 U.S. at 9. The question in *Klamath* was whether letters from Indian tribes that had been requested by the Department of the Interior were exempt from disclosure under Exemption 5.

Quoting Justice Scalia's statement in *United States Department of Justice* v. *Julian*, 486 U. S. 1, 18 n.1 (1988) (dissenting opinion), that "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency," the *Klamath* Court observed that some lower courts had extended Exemption 5 to encompass "communications between Government agencies and outside consultants hired by them." 532 U.S. at 10.

The Court in *Klamath* expressly refused to decide whether consultants' reports may ever be protected as "intra-agency" documents under Exemption 5, because—even if they could—"consultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." 532 U.S. at 12. Because the Indian tribes clearly were communicating in their own interest, any "consultant corollary" to Exemption 5 could not apply to the documents submitted by the tribes. *Id.* at 11.

2. President Bush in November 2001 issued a military order authorizing the creation of commissions to try suspected terrorists. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The order directed the Secretary of Defense to promulgate implementing regulations. *Ibid.*

The Department of Defense did not seek public comment with respect to these regulations. It did, however, solicit private comments regarding the draft regulations from a number of private individuals. Thus, in a March 21, 2002, press briefing, the Secretary of Defense expressed his personal appre-

ciation for the comments of "a number of non-Defense Department individuals, most of them former government officials or judicial officers of various types" who "just volunteered to help out and have been enormously helpful." U.S. Department of Defense News Transcript, *DoD News Briefing on Military Commissions* (Mar. 21, 2002), available at www. defenselink. mil/transcripts/transcript.aspx? transcriptid=3367. Secretary Rumsfeld identified nine distinguished attorneys from private practice and academia, "none of [whom] work for this department" who participated "without compensation" in the development of the commissions' procedures. *Ibid.*

On July 1, 2003, the Department published its rules governing the military commissions. See *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, 68 Fed. Reg. 39,374 (July 1, 2003).

3. The National Institute of Military Justice ("NIMJ") is a non-profit organization dedicated to improving public understanding of the military justice system and to advancing the fair administration of military justice. Shortly after the military commission rules were published, NIMJ filed a carefully tailored FOIA request seeking records of communications between DoD personnel and members of the public relating to the creation of the commissions and their governing rules. NIMJ requested

> all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or an employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Mili-

> tary Order, the Secretary's Military Commission Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

App., *infra*, 42a-43a. The request thus specifically excluded traditionally exempt documents such as draft correspondence or internal communications within or among government departments, agencies, or personnel.

The Government initially released nine pages of documents in response to NIMJ's request. Gov't Ct. App. Br. 3.

B. The Proceedings In The District Court

After the government failed to respond in a timely fashion to NIMJ's administrative appeal, NIMJ commenced this action in the District Court for the District of Columbia under 5 U.S.C. § 552(a)(4)(B) to force the government to comply with its FOIA obligations. App., *infra*, 5a.

Several months later, the government released additional documents from the Defense Department's Office of General Counsel responsive to NIMJ's request. App., *infra*, 43a n.2.

The district court found that the government failed to "compl[y] with its obligations under the FOIA" by conducting an "inadequate" search for documents. App., *infra*, 85a, 86a. "Troubled by the government's failure to timely and adequately respond to plaintiff's FOIA request," the court ordered the government to conduct an additional search for responsive documents. *Id.* at 86a. Several hundred

additional documents were provided to NIMJ. Govt. Ct. App. Br. 3-4.

The government also produced a revised *Vaughn* index describing 87 responsive documents that it had either withheld or redacted. App., *infra*, 44a. Nineteen of the withheld documents are at issue in this case, consisting of comments on draft regulations "solicited and received * * * from a number of non-governmental lawyers, who were former high ranking government officials or academics or both." *Id.* at 3a.

NIMJ challenged DoD's withholding of this correspondence from volunteer private citizens. Relying on what it believed to be binding District of Columbia Circuit precedent, the district court granted summary judgment for the government, holding that Exemption 5 protects the documents against disclosure under the FOIA. App., *infra*, 80a.[1]

Citing *Klamath*, the district court stated that "[t]he Supreme Court has made clear that Exemption 5 protects not only inter-agency and intra-agency communications among employees, but also communications from outside consultants or other individuals hired or solicited by an agency for their views." App., *infra*, 72a. The district court concluded that pre-*Klamath* decisions by the D.C. Circuit applying Exemption 5 to documents produced by non-government employees accordingly "remain good law." *Id.* at 73a.

The court then went on to reject several limitations on the scope of Exemption 5. First, it held that

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[1] Although the documents at issue were submitted by lawyers, the government did not rely on the attorney-client privilege in opposing release of the documents in the courts below.

Exemption 5 is not limited to "outside consultants * * * who are paid or provide extensive service to an agency." App., *infra*, 74a n.12. Second, the court declined to require that outside authors "possess expertise not possessed by the agency." *Id.* at 75a. Third, the court rejected a requirement that "the defendant must establish that the views of the non-agency attorneys were furnished in confidence [in order] to be considered intra-agency documents." *Id.* at 75a n.13. Because there was no evidence that the individuals here "were representing their personal interests or the interests of any clients in making their comments," the court held that the documents were exempt from disclosure. *Id.* at 74a.

C. The Court of Appeals Decision

The court of appeals affirmed by a divided vote. App. *infra*, 1a-40a. The majority determined that the D.C. Circuit's pre-*Klamath* decisions addressing the applicability of Exemption 5 to non-agency documents—*Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997); *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980); and *Formaldehyde Institute* v. *Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989)—adopted the principle that documents "submitted by non-agency parties in response to an agency's request for advice" are "covered by Exemption 5." App., *infra*, 7a. Because this Court in *Klamath* reserved the question whether documents prepared by non-agency employees could be covered by Exemption 5, the majority below "perceive[d] no basis to jettison [its] binding Circuit precedent." *Id.* at 12a.

The majority distinguished *Klamath* on the ground that the commenters here were not advancing a particular interest: "[u]nlike the Indian tribes in *Klamath*, the individuals DoD consulted had no

individual interests to promote in their submissions." App., *infra*, 13a. The majority acknowledged that these individuals were "private citizens rather than government employees or paid contract consultants," but saw "no reason why the absence of a contract or compensation should differentiate them from the 'typical' outside agency consultants. These were not random citizens volunteering their opinions. DoD sought these individuals out and solicited their counsel based on their undisputed experience and qualifications." *Id.* at 13a-14a.

The majority stated that its determination did not violate *Klamath*'s injunction to respect the language of the statute because "DoD itself solicited the advice contained in the documents" from the particular individuals "for the agency's own use in promulgating terrorist trial commission regulations. Under such circumstances," the majority concluded, interpreting Exemption 5 to apply was consistent with the "common sense" observation in *Ryan* that "'[i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees.'" App., *infra*, 16a (quoting *Ryan*, 617 F.2d at 789).

The majority observed that the *Ryan* test requires "indicia of a consultant relationship between the outsider and the agency" and held that such a relationship may be established "by the fact that the agency seeks out the individual consultants and affirmatively solicits their advice in aid of agency business." App., *infra*, 19a. Because the Defense Department asked the individuals to comment on the commission procedure, Exemption 5 applied to their communications.

Judge Tatel dissented. App., *infra*, 23a-40a. He stated that "the court's holding does exactly what the Supreme Court forbade in [*Klamath*]: it makes 'intra-agency' * * * a purely conclusory term." *Id.* at 23a. Beginning his analysis with the text of the statute, Judge Tatel stated that "'the most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency.'" *Id.* at 24a (quoting *Klamath*, 532 U.S. at 9).

Judge Tatel concluded that cases extending Exemption 5 to documents prepared by paid consultants "certainly stretch the meaning of 'intra-agency,'" but still plausibly interpret that term: "when an agency hires consultants to perform a task, it's not unreasonable to say they have become part of the agency for purposes of that project, making any documents they produce for the project 'intra-agency.'" App., *infra*, 25a.

"In this case, however," Judge Tatel continued, "the government asks us to stretch Exemption 5 beyond its breaking point, to cover *everyone* an agency asks for advice. The government's argument flatly ignores the statute's text, as well as our obligation to construe FOIA exemptions narrowly." App., *infra*, 25a-26a (emphasis in original).

Judge Tatel explained that the D.C. Circuit's pre-*Klamath* decisions "say it makes no difference whether the documents at issue were generated by someone within the agency. All that matters, they hold, is that the documents played a role in the agency's deliberative process, a standard indisputably met here." App., *infra*, 29a. "The problem with these cases," he stated, "is that in *Klamath* the Supreme Court rejected exactly this type of reasoning." *Ibid.*

"[O]ur earlier cases protecting communications from outside consultants under Exemption 5 remain good law only to the extent they give 'independent vitality' to the meaning of 'intra-agency.'" App., *infra*, 30a-31a (quoting *Klamath*, 532 U.S. at 12). Judge Tatel stated that he could agree "that Exemption 5 protects documents agencies solicit from people who could plausibly be called 'intra-agency,' such as paid consultants or members of official agency committees created under [the Federal Advisory Committee Act]. The problem, however, is that the court holds that a document qualifies as 'intra-agency' if an agency solicits it from *anyone*." App., *infra*, 32a (emphasis in original). "Rather than giving 'independent vitality' to 'intra-agency,' this test redefines that term." *Ibid.*

"Indeed," Judge Tatel observed,

> under the court's rule, if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as 'intra-agency.' Seeking to escape this untenable result, the court adds a new requirement: the solicitation must be 'formal.' Requiring formality, however, does nothing to prevent absurd results: For example, an agency request for advice published in the Federal Register would be 'formal,' but hardly enough to make letters sent by members of the public who responded 'intra-agency.' * * * The court next suggests that a solicitation suffices if addressed to a 'discrete group of experts.' But a DoD request for advice to every law professor in the country would qualify as a request to a 'discrete group of experts,' yet the professors' responses plainly would not be 'intra-agency.'

App., *infra*, 33a (citations omitted).

Because "Exemption 5's words 'simply will not stretch to cover this situation,' and because the result the court reaches contravenes *Klamath*," Judge Tatel concluded that Exemption 5 does not apply to the private citizens' submissions. App., *infra*, 40a (citation omitted).

REASONS FOR GRANTING THE PETITION

The majority below adopted an extraordinarily expansive construction of "intra-agency memorandums or letters"—encompassing any submission from any private citizen as long as it is in some way solicited by a government employee and the author is not self-interested. That interpretation of the statute bears no relation to the common meaning of "intra-agency," is wholly inconsistent with this Court's reasoning in *Klamath*, and will transform individual FOIA actions into litigation quagmires investigating whether a particular private citizen's submission was sufficiently tied to his or her self-interest to lose its putative status as an "intra-agency" communication.

The dispute between the majority and the dissenting judge below turns entirely on their diametrically opposed readings of this Court's decision in *Klamath*. Only this Court can resolve that disagreement. In addition, because the D.C. Circuit is designated by Congress as the principal forum for FOIA litigation—and because this issue regarding the meaning of "intra-agency" in Exemption 5 arises with considerable frequency—the decision below will have a very substantial continuing impact on FOIA claims. Review by this Court is therefore plainly warranted.

A. The Court Of Appeals' Broad Construction Of Exemption 5 Is Inconsistent With The Statute's Plain Language And This Court's Ruling In *Klamath*.

Exemption 5 applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "Agency," in turn, is defined by the statute as "each authority of the Government of the United States" (*id.* § 551(1)) and "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch * * *, or any independent regulatory agency." *Id.* § 552(f); see also *id.* § 551(1) (excluding Congress, the courts, and other entities and authorities). Thus, as this Court observed in *Klamath*, "'the most natural meaning of the phrase "intra-agency memorandum" is a memorandum that is addressed both to and from employees of a single agency.'" 532 U.S. at 9 (quoting *Julian*, 486 at 18 n.1 (Scalia, J., joined by White & O'Connor, JJ., dissenting)).

Justice Scalia's opinion in *Julian* recognized that the statutory definition could in some circumstances reach more broadly:

> It is textually possible and * * * in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as employee or consultant to the agency, or as employee or officer of another governmental unit (not an

> agency) that is authorized or required to provide advice to the agency.

486 U.S. at 18 n.1 (dissenting opinion).

The Court in *Klamath* explicitly reserved the question whether Exemption 5 applies to *any* documents prepared by individuals not acting in an official governmentally-conferred capacity. The Court held that—even if Exemption 5 does encompass some documents prepared by non-government employees—the exemption could not extend to documents prepared by individuals "communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." 532 U.S. at 12.

The majority below interpreted *Klamath*'s holding that communications by self-interested outsiders *never* qualify as "intra-agency" to mean that communications by outsiders who are not self-interested *always* qualify as "intra-agency." But *Klamath* expressly did not decide that question. As Judge Tatel explained in detail, moreover, the majority's extraordinarily broad construction of "intra-agency" is inconsistent with the language of the statute and with the Court's reasoning in *Klamath*.

First, there is no way to reconcile the majority's expansive construction of Exemption 5 with the statute's plain language. Justice Scalia in *Julian* explained how the text could be read to encompass individuals with some official governmentally-conferred status. Under the majority's view, however, a government official's solicitation of information from a private individual creates a sufficient relationship between the private individual and the government to transform a communication from that individual into an "intra-agency" document. That

stretches the ordinary meaning of "intra-agency" far beyond the breaking point. "Rather than giving 'independent vitality' to 'intra-agency,' this test redefines that term." App., *infra*, 32 (Tatel, J., dissenting) (citation omitted).

Second, the *Klamath* Court emphasized that there is "no textual justification for draining the first condition of independent vitality," refusing to accept the government's argument "that 'intra-agency' is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." 532 U.S. at 12. But the majority's construction of the statute here rests squarely on precisely the result-oriented approach rejected in *Klamath*: that an "intra-agency" communication occurs whenever the agency solicits information from anyone, because "federal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unravelling their knotty complexities." App., *infra*, 12a. (internal quotation marks omitted). The content of the majority's standard is not in any way based on the ordinary meaning of the term Congress selected.

Third, Judge Tatel's interpretation of the statute, by contrast, is based on the statutory language. As Judge Tatel explained, "one can plausibly say that some paid consultants and members of official agency committees have come 'within' the agency. * * * An agency's mere request for advice * * * has nothing to do with whether a person's response comes from within or outside the agency. Without some indicia that the person responding is 'within' the agency, such as a paid consulting contract, 'intra-agency' has no meaning." *Id.* at 34a (dissenting opinion); see also *id.* at 37a ("contracting with and paying

a consultant establishes a formal relationship between that person and the agency, making it at least plausible to consider the person 'intra-agency'").

Fourth, this Court has held repeatedly that FOIA exemptions should "be narrowly construed." *Rose*, 425 U.S. at *361*; see also *Klamath*, 532 U.S. at 16 (exemptions should "be read strictly in order to serve FOIA's mandate of broad disclosure"); *FBI* v. *Abramson*, 456 U.S. 615, 630 (1982) (same). The majority's interpretation of Exemption 5 plainly fails this test.

Fifth, the majority's construction of the statute will lead to absurd results. As Judge Tatel pointed out, "under the court's rule, if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as 'intra-agency.' * * * The court [also] suggests that a solicitation suffices if addressed to a 'discrete group of experts.' But a DoD request for advice to every law professor in the country would qualify as a request to a 'discrete group of experts,' yet the professors' responses plainly would not be 'intra-agency.'" App., *infra*, 33a (citation omitted).[2]

The majority's construction of Exemption 5 thus will transform a statute intended to promote government transparency into a device to allow government officials to conceal information from selected individuals simply by soliciting those individuals' views. The opportunities for abuse of the system—concealing the views of favored individuals while leaving the views of others available to the public—are immense.

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[2] The majority disputed (App., *infra*, 20a-21a) Judge Tatel's explanation of the implications of its broad interpretation of exemption five, but was unable to explain why its rationale would not lead to the results he predicted. See *id.* at 33a-34a (dissenting opinion).

Moreover, the majority's standard will lead to a litigation quagmire. Members of the public seeking access to the information provided by these private individuals would be forced to demonstrate that the individuals had an "individual interest[] to promote" (App., *infra*, 13a)—requiring intrusive discovery as well as continued judicial elaboration regarding the type of personal "interest" sufficient to remove a private citizen's communications from the protection of Exemption 5: is financial interest necessary, or would political or personal interest suffice? What about a deeply-held scholarly, religious, or moral perspective or a settled view about the role and responsibility of government—are those sufficient "interests"?

This Court should grant review to correct the plainly erroneous interpretation of the statute adopted by the majority below.

B. Review Is Appropriate Because Only This Court Can Correct The Flawed Interpretation Of *Klamath* Adopted By The Principal Circuit For FOIA Litigation.

The majority and dissenting opinions below reflect a fundamental disagreement regarding the proper interpretation of this Court's decision in *Klamath*. Only this Court can correct the majority's flawed conclusion, an error that will have a very substantial impact on FOIA litigation given the D.C. Circuit's principal role in adjudicating FOIA disputes.

The majority rested its decision squarely on its conclusion that neither *Klamath*'s holding nor its reasoning warranted overruling prior D.C. Circuit caselaw interpreting the "intra-agency" requirement of Exemption 5. App., *infra*, 12a. Indeed, the major-

ity refused to "construe afresh the statutory language" in light of this Court's reasoning in *Klamath*, concluding that "[t]o the extent [the prior decisions] are not 'effectively overrule[d]' by *Klamath* * * * we are bound by their holdings." *Id.* at 12a n.7.

Judge Tatel reached the opposite conclusion, determining that the reasoning of the prior D.C. Circuit decisions "is precisely what *Klamath* rejects: the 'argument skips a necessary step, for it ignores the first condition of Exemption 5' and makes 'intra-agency' . . . a purely conclusory term." App., *infra*, 31a (quoting *Klamath*, 532 U.S. at 12); see also App., *infra*, 36a (dissenting opinion) (*Klamath* decided "that courts may not 'ignore the first condition of Exemption 5' * * *, precisely what [the D.C. Circuit] did in *Ryan*, *Formaldehyde*, and *Public Citizen*"; "*Klamath* eviscerates the reasoning in the *Ryan* line of cases").

This Court's intervention is urgently needed to provide guidance regarding the proper interpretation of its decision in *Klamath*. Indeed, the majority makes clear the D.C. Circuit's resolve to continue to adhere to its pre-*Klamath* precedent regarding Exemption 5 in the absence of further guidance from this Court.

The D.C. Circuit's erroneous conclusion with respect to this issue will have a particularly significant impact because of that court's principal role in adjudicating FOIA disputes. Every FOIA action may be brought in the District of Columbia. 5 U.S.C. § 552(a)(4)(B). Moreover, "[b]ecause there are a number of federal government agencies located in Washington, D.C., it is not surprising that the majority of the caselaw interpreting FOIA has been decided by the D.C. Circuit." *Miccosukee Tribe of the Indians of Florida* v. *United States*, 516 F.3d 1235, 1257 n.23

(11th Cir. 2008). Absent a grant of review by this Court, therefore, the erroneous decision below will affect a very substantial percentage of the FOIA actions litigated in the federal courts.

C. Questions Regarding The Application Of Exemption 5 To Documents Submitted By Persons Outside The Government Arise With Considerable Frequency.

The question presented here—the standard for determining whether a document prepared by a private individual qualifies as an "intra-agency" communication—arises with considerable frequency in FOIA litigation. After all, there are "literally millions of documents and memoranda of various kinds on a myriad of subjects which repose in the files of executive departments and independent agencies * * * which were created by someone outside the executive branch but in response to an initiative from the executive branch." *Ryan*, 617 F.2d at 790.

In the last two years alone, there have been a significant number of decisions addressing the issue. See *Information Network for Responsible Mining ("INFORM")* v. *Dep't of Energy*, No. 06-CV-02271-REB, 2008 WL 762248, at *7 (D. Colo. Mar. 18, 2008) (exempting documents submitted by government-hired consultant "when the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done and when the outsider does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it"); *Citizens for Responsibility & Ethics in Washington* v. *Dep't of Homeland Security*, 514 F.Supp.2d 36, 44 (D.D.C. 2007) (exempting documents "when an agency solicits opinions from and recommendations by tempo-

rary, outside consultants" hired by the government); *People For The American Way Foundation* v. *Dep't of Educ.*, 516 F.Supp.2d 28, 36-39 (D.D.C. 2007) (rejecting an Exemption 5 claim for documents exchanged between the U.S. Department of Education and the D.C. Mayor's Office); *Board of County Comm'rs* v. *Dep't of the Interior*, No. 2:06-CV-209-TC, 2007 WL 2156613, at *11 (D. Utah July 26, 2007) (holding Exemption 5 inapplicable because "[e]ven though he may not have been competing with others for grazing permits * * *, [the private citizen's] deep-seated views regarding the retirement of grazing permits through market-based principles shows that he is communicating with the DOI in the interest of his deep-seated views, not as a disinterested expert"); *Nulankeyutmonen Nkihtaqmikon* v. *Bureau of Indian Affairs*, 493 F. Supp. 2d 91, 106 (D.Me. 2007) (finding "hybrid" group to be an agency where some members were appointed by the President); *Missouri Coalition for Environment Foundation* v. *Army Corps of Eng'rs*, No. 4:05CV02039 FRB, 2007 WL 869487, at *5 (E.D.Mo. Mar. 20, 2007) (exemption applicable because outside group was a hired government consultant); *Sakamoto* v. *Environmental Protection Agency*, 443 F.Supp.2d 1182, 1199-1200 (N.D. Cal. 2006) (same); *Votehemp, Inc.* v. *Drug Enforcement Admin.*, No. 02-985 (RBW), 2006 WL 1826007, at *7 (D.D.C. June 30, 2006) (holding that "the document qualifies as an intra-agency memoranda even though it was drafted by an outside consultant" hired by the government); *Natural Resources Defense Council* v. *U.S. Dept. of Defense*, 442 F.Supp.2d 857, 867 (C.D. Cal. 2006) (finding insufficient evidence to support exemption and noting "[a]lthough courts have upheld the application of Exemption 5 to documents generated by or disclosed to non-government parties such as contractors and consultants, they have done so

generally when those parties were serving as agents of the government agency and were directly involved in the internal agency decision-making that FOIA protects").

Significantly, the decisions outside the District of Columbia Circuit reflect the distinction identified by Justice Scalia in *Julian* and adopted by Judge Tatel: documents prepared by paid consultants or others with an officially-conferred government status are found to be "intra-agency" while documents prepared by purely private citizens are not. The rule adopted by the majority below is thus out of step with the principles applied by other courts in these cases that arise with substantial frequency. Review by this Court is appropriate to correct the majority's stark misinterpretation of *Klamath* with respect to this important issue of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2008

APPENDICES

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 5, 2007
Decided January 11, 2008
No. 06-5242

NATIONAL INSTITUTE OF MILITARY JUSTICE,
APPELLANT

v.

UNITED STATES DEPARTMENT OF DEFENSE,
APPELLEE

Appeal from the United States District Court for the District of Columbia

(No. 04cv00312)

Before: HENDERSON and TATEL, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

Dissenting opinion filed by *Circuit Judge* TATEL.

KAREN LECRAFT HENDERSON, *Circuit Judge*: The National Institute of Military Justice (NIMJ) filed this action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking, *inter alia*, nineteen records containing the opinions and recommendations of non-governmental lawyers whose advice the United States Department of Defense (DoD) solicited to promulgate regulations establishing terrorist trial commissions. The district court granted summary judgment in DoD's favor, concluding that the documents are exempt from dis-

closure under FOIA Exemption 5, *id.* § 552(b)(5). *See Nat'l Inst. of Military Justice* v. *U.S. Dep't of Defense*, 404 F. Supp. 2d 325, 342-47 (D.D.C. 2005). We agree that the documents are protected by FOIA Exemption 5 and therefore affirm the judgment of the district court.

I.

On November 13, 2001 President George W. Bush issued a Military Order to establish military commissions to try terrorists. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001). The Military Order stated that any person subject to it—i.e., any non-citizen who the President determines there is reason to believe has been a member of al Qaeda, has engaged in acts of international terrorism against the United States or has knowingly harbored such persons—"shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed." *Id.* at 57,834. The Military Order further directed that the Secretary of Defense "shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out" the trials. *Id.*[1]

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[1] The Military Order further provided that the orders and regulations:

> shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—
>
> (1) military commissions to sit at any time and any place ...;

In the course of promulgating regulations,[2] DoD solicited and received comments from a number of non-governmental lawyers, who were former high ranking governmental officials or academics or both. According to DoD, it

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> (2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
>
> (3) admission of such evidence as would ... have probative value to a reasonable person;
>
> (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;
>
> (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;
>
> (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
>
> (7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
>
> (8) submission of the record of the trial, including any conviction or sentence, for review and final decision by [the President] or by the Secretary of Defense if so designated by [the President] for that purpose.

66 Fed. Reg. at 57,834-85.

[2] The regulations issued in final form on July 1, 2003. *See* 68 Fed. Reg. 39,397 (July 1, 2003).

> sought the opinions and recommendations of these outside consultants because their previous experience in the government and/or their expertise made them uniquely qualified to provide advice to the General Counsel's office on the Military Commissions procedures. Each was asked to provide their comments on the proposed Military Commission procedures.

Decl. of Christine S. Ricci, DoD Assoc. Dep. Gen. Counsel, (Ricci Decl.) 10 (Mar. 9, 2005). Although the consultants were "not paid for their services," there was "an understanding that they w[ould] consult and advise on a continuing basis." Decl. of Karen L. Hecker, Assoc. Dep. Gen. Counsel, Office of Gen. Counsel, DoD, (Hecker Decl.) 2 (July 18, 2005). There was also "an understanding that the contents of the consultations would not be released publicly." Decl. of Paul W. Cobb, Jr., former Dep. Gen. Counsel, Office of Gen. Counsel, DoD, (Cobb Decl.) 3 (Feb. 16, 2005).[3]

On October 3, 2003, NIMJ submitted a FOIA request to DoD seeking

> all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Military Order, the Secretary's Military Commission

[3] The views of individuals who were "not consulted with on a continuing basis or with the understanding and expectation that their comments would be kept in confidence" were not withheld as exempt. Hecker Decl. 3-4.

> Orders, and the Military Commission Instructions. This request includes but is not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

Compl. ¶ 5 (quoting FOIA Request Letter, Oct. 3, 2003); *see Nat'l Inst. of Military Justice*, 404 F. Supp. 2d at 330. In response, DoD released numerous documents but withheld others it considered exempt, including the nineteen documents NIMJ now seeks which DoD withheld as exempt under FOIA Exemption 5.

On February 26, 2004, NIMJ filed this action in the district court seeking the withheld documents. In an opinion and order filed December 16, 2005, the district court granted partial summary judgment in DoD's favor, concluding, inter alia, that the nineteen documents are exempt from disclosure, as claimed, under FOIA Exemption 5. *Nat'l Inst. of Military Justice*, 404 F. Supp. 2d at 342-47. In an opinion and order filed June 12, 2006, the district court granted final summary judgment in DoD's favor and this appeal followed.

II.

NIMJ appeals the district court's grant of summary judgment as to the nineteen documents the court held exempt under FOIA Exemption 5. Exemption 5 provides that FOIA "does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Relying heavily on the United States Supreme Court's deci-

sion in *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), NIMJ asserts that Exemption 5 does not apply because the documents sought are not "inter-agency" or "intra-agency," as required by the statutory language.[4] We reject its challenge because our Circuit precedent interprets "intra-agency" to include agency records containing comments solicited from nongovernmental parties such as the lawyers whose counsel DoD sought—and, more to the point, our precedent is not inconsistent with *Klamath*.

In *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), we held that documents submitted by United States senators in response to a questionnaire they received from the Department of Justice about procedures for selecting and recommending potential judicial nominees were exempt from FOIA disclosure under Exemption 5. We rejected the FOIA requesters' argument that, because the senators were "not agencies within the meaning of the FOIA," the withheld questionnaires "c[ould]not be termed 'inter-agency' or 'intra-agency' " within the meaning of Exemption 5, reasoning:

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[4] There is no dispute that the withheld documents satisfy the second requirement in Exemption 5—that they be "unavailable by law" under one of the established civil discovery privileges—here, under the "deliberative process" privilege. See *Dep't of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001). To qualify for Exemption 5 protection under the deliberative process privilege, "an agency's materials must be both 'predecisional' and a part of the 'deliberative process.' " *Formaldehyde Inst.* v. *Dep't of Health & Human Servs.*, 889 F.2d 1118, 1121 (D.C. Cir. 1989) (citing *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975)). The withheld documents are plainly both.

> When interpreted in light of its purpose, . . . the language of Exemption 5 clearly embraces this situation. The exemption was created to protect the deliberative process of the government, by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision-makers without fear of publicity. In the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees. Such consultations are an integral part of its deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions.

Ryan, 617 F.2d at 789-90 (citation footnote omitted). Noting that "efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency or are solicited to give advice only for specific projects," we concluded: "When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." *Id.* at 790. Integral to the court's analysis was the fact that the documents sought "were generated by an initiative from the Department of Justice, *i.e.*, the question-

naire sent out by the Department to the Senators." *Id.*[5]

In *Formaldehyde Institute* v. *Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989), we clarified that Exemption 5 extends to documents received from private, nongovernmental parties. In particular, we concluded the exemption protected documents containing comments of two private referees for the American Journal of Epidemiology on a report submitted for publication by a staff member of the Centers for Disease Control (CDC). Relying largely on *Ryan*, we found immaterial "the absence of any formal relationship" between the reviewers and the Department of Health and Human Services (HHS), 889 F.2d at 1123, explaining that " '[w]hether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations,' " *id.* at 1122 (quoting *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1161-62 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988)).

More recently, in *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), we held exempt from disclosure records containing

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[5] The court observed that "[t]he questionnaire plus replies must correspond in origin and process to literally *millions* of documents and memoranda of various kinds on a myriad of subjects which repose in the files of the executive departments and independent agencies, *i.e.*, memoranda which were created by someone outside the executive branch but in response to an initiative from the executive branch," noting that "[f]or example, the Department of Agriculture must have bales of information in response to questionnaires." *Ryan*, 617 F.2d at 790 & n.29.

communications among former President Reagan, the National Archives and the Department of Justice and among former President Bush and the same agencies regarding electronic records of each of the two Presidents' administrations. Acknowledging that "Public Citizen is doubtless right that a former President is not an agency under FOIA," we affirmed that "records of communications between an agency and outside consultants qualify as 'intra-agency' for purposes of Exemption 5 if they have been 'created for the purpose of aiding the *agency's* deliberative process.' " *Pub. Citizen*, 111 F.3d at 170 (quoting *Dow Jones & Co.* v. *Dep't of Justice*, 917 F.2d 571, 575 (D.C. Cir. 1990) (emphasis by *Dow Jones* court)) (citing *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1161 (D.C. Cir. 1987)).

Taken together, the foregoing cases compel us to conclude that documents such as the ones here—submitted by non-agency parties in response to an agency's request for advice—are covered by Exemption 5. NIMJ attempts to distinguish those cases factually but to no avail. NIMJ first asserts, for example, that neither *Ryan* nor *Public Citizen* involved " 'ordinary private citizen[s],' " Opening Br. at 14 (quoting *Pub. Citizen*, 111 F.3d at 170)—but this argument overlooks the fact that *Formaldehyde Institute* did involve private citizens (two outside referees). NIMJ also contends that the "consultative relationship" here is not, as it was in *Public Citizen*, "mandated by statute," *id.*—but neither was it in either *Ryan* or *Formaldehyde Institute*.[6] *See Ryan*, 617

[6] NIMJ asserts, somewhat inaccurately, that "this Court in *Formaldehyde Institute* focused on the statutory mandate underlying the consultative process at issue." Opening Br. at 16-17. In that case, however, it was the decision, not the consultation, that was statutorily mandated.

F.2d at 784 (questionnaires sent to senators in response to Executive Order No. 12097 directing U.S. Attorney General to assist in promulgating "standards and guidelines for the selection of nominees for United States district court judgeships," 43 Fed. Reg. 52,455, 52,455 (Nov. 13, 1978)); *Formaldehyde Inst.*, 889 F.2d at 1119 (reviewers commented in response to CDC employee's submission of article to private journal).

NIMJ next asserts that the cited Circuit precedents, even if otherwise controlling, have been "superseded" by the Supreme Court's decision in *Klamath*. Again we disagree.

In *Klamath*, the Court concluded that Exemption 5 does not protect documents submitted by Indian Tribes to the Department of the Interior, which documents addressed tribal interests that were then the subject of state and federal water allocation proceedings. In rejecting the Government's exemption claim, the Court focused on the language in Exemption 5 requiring that exempt documents be either "inter-agency or intra-agency," 532 U.S. at 9, and emphasized that there is "no textual justification for draining the first condition of independent vitality," *id.* at 12. Noting that the statute was silent "about communications with outsiders," the Court observed that "some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra-

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See Formaldehyde Inst., 898 F.2d at 1124 ("Thus, *Congress* has directed HHS to make precisely the kind of 'deliberative' decision HHS made as a result of a process that involved HHS' receipt of the Review Letter." (emphasis in original)). In this case, an equally "deliberative" decision was mandated by the Military Order.

agency' memorandum under Exemption 5" under the so-called "consultant corollary" to Exemption 5. *Id.* at 9. "Typically," the Court added, "courts taking [this] view have held that the exemption extends to communications between Government agencies and outside consultants hired by them." *Id.* "In such cases," the Court noted, "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done," notwithstanding the consultants "were independent contractors and were not assumed to be subject to the degree of control that agency employment could have entailed" and they were not necessarily "devoid of a definite point of view." *Id.* The Court concluded, however, that the Indian Tribes in *Klamath* were not analogous to government consultants.

The Court explained that "the fact about the consultant that is constant in the typical cases is that the consultant does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it." *Id.* at 10-11. "Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 11. By contrast the Indian Tribes "necessarily communicate with the Bureau with their own, albeit entirely legitimate, interests in mind." *Id.* at 12. Although concluding that "this fact alone distinguishes tribal communications from the consultants' examples recognized by several Courts of Appeals," the Court further found that "the distinction is even sharper, in that the [Indian] Tribes are self-advocates at the expense of others seeking benefits inadequate to satisfy everyone." *Id.* Finding the circuit cases on outside consultants thus distinguish-

able, the Court expressly declined to decide whether such consultants' reports "may qualify as intra-agency under Exemption 5." *Id.* at 12.

Given the Supreme Court's disclaimer and its reasoning, we perceive no basis to jettison our binding Circuit precedent. *See United States* v. *Carson*, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006) ("[W]e are, of course, bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court." (citing *Brewster* v. *Comm'r*, 607 F.2d 1369, 1373 (D.C. Cir. 1979))).[7] It remains true that "'federal agencies occasionally will encounter problems outside their ken, and it clearly is preferable that they enlist the help of outside experts skilled at unravelling their knotty complexities.' " *Formaldehyde Inst.*, 889 F.2d at 1122 (quoting *CNA Fin. Corp.* v. *Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987)). It

[7] The dissent contends we should leapfrog our precedent and construe afresh the statutory language, Dissent at 2—but we do not write on a clean slate. As we have recounted, in previous opinions this Circuit has repeatedly interpreted Exemption 5 to extend to documents generated by non-agency individuals under our consultant corollary. To the extent they are not "effectively overrule[d]" by *Klamath*—and we do not believe that they are as we apply them—we are bound by their holdings. *See United States* v. *Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999) (stating whether Supreme Court opinion supersedes Circuit precedent interpreting statute depends on whether opinion "effectively overrules, i.e., "eviscerate[s]" precedent and concluding: "That the Supreme Court had doubts about the constitutionality of [a] statute, doubts that it never had to resolve, is simply too thin a reed to permit a panel of this court to find similar doubts in a different statute and, based on those doubts, to depart from circuit precedent expressly interpreting the statute . . . .") (internal quotation omitted).

was plainly preferable in this case for DoD to consult as widely as possible in order to fairly but effectively try terrorists in the aftermath of September 11, 2001. Unlike the Indian tribes in *Klamath*, the individuals DoD consulted had no individual interests to promote in their submissions, as NIMJ itself concedes. *See* Reply Br. at 4 n.1 ("The government is correct that NIMJ has made no suggestion of personal interest in these proceedings, nor does it intend to impugn the integrity of the distinguished individuals at issue."); *cf.* Cobb. Decl. 4 (stating that in addition to the "few written comments . . . received from individual lawyers who had been asked by the General Counsel to provide confidential legal views"—comments which NIMJ now seeks—"[m]any more comments came from members of the public or organizations *with an interest in these matters*, like Human Rights Watch or the American Bar Association"—"[s]ome of these comments were solicited; many were not"—comments for which DoD did not claim the Exemption) (emphasis added). For this reason, the case before us is readily distinguishable from *Klamath*, in which "the dispositive point [was] that the apparent object of the Tribe's communications is a decision by an agency of the Government to support a claim by the Tribe that is necessarily adverse to the interests of competitors." *Klamath*, 532 U.S. at 14. Further, although the individuals DoD consulted are, as NIMJ notes, private citizens rather than government employees or paid contract consultants, we see no reason why the absence of a contract or compensation should differentiate them from the "typical" outside agency consultants. These were not random citizens volunteering their opinions. DOD sought these individuals out and solicited their counsel based on their undisputed experience and

qualifications. *See* Ricci Decl. 10-11).[8] Their contributions to DoD's deliberation in promulgating regulations were no less valuable or confidential for the lack of compensation or formal contract.

Our established line of consultant cases is all the more compelling given that we have acknowledged the survival of our "consultant corollary" in the wake of *Klamath*. In *Judicial Watch, Inc.* v. *Department of Energy*, 412 F.3d 125 (D.C. Cir. 2005), two public interest organizations sought disclosure of documents held by eight federal agencies.[9] The documents had been prepared by the National Energy Policy Development Group (NEPDG), which was established by the President and composed of high ranking federal

[8] They were an undisputedly distinguished group of individuals: a former DoD General Counsel, a former Secretary of the United States Department of Transportation, a former Legal Counsel to the President, a former Director of the Central Intelligence Agency and the Federal Bureau of Investigation, a former Secretary of the Army, a former Assistant Trial Counsel at the Nuremberg International War Trials, a former Special Counsel to the DoD General Counsel, a former Federal Communications Commission Chairman, a former Deputy Chief of the Fraud Section in the Department of Justice Criminal Division, a former DoD Deputy General Counsel, a former professor at the United States Naval War College and a member of the Secretary of State's Advisory Committee for International Law and the DoD Defense Policy Board, and a law professor and former Director of the American Law Institute. Second *Vaughn* Index of Docs. Withheld, filed in *NIMJ* v. *DoD*, No. 04-312 (D.D.C. Mar. 9, 2005).

[9] The agencies were: the United States Departments of Agriculture, Commerce, Energy, the Interior, Transportation and the Treasury, the Environmental Protection Agency and the Federal Emergency Management Agency. *Judicial Watch*, 412 F.3d at 127.

officials and employees detailed from federal agencies. We concluded that the withheld documents were protected under Exemption 5 notwithstanding NEPDG did not qualify as an "agency" under FOIA ("because its sole function [was] to advise and assist the President," 412 F.3d at 129) and it did not prepare the documents for an agency. We there acknowledged *Klamath*'s admonition that, to be protected by Exemption 5, a document must not only be pre-decisicnal and deliberative but "by the terms of Exemption 5, it must also be an 'inter-agency' or an 'intra-agency' record," 412 F.3d at 129 (citing *Klamath*, 532 U.S. at 9). We nonetheless found that "[o]ur interpretation of Exemption 5"—that documents held by agencies but prepared by the non-agency NEPDG come within Exemption 5's protection—"is not inconsistent with its textual limitation to 'intra-agency' or 'inter-agency' communications"; "[r]ather it follows from the principle, well established in this Circuit, that a document need not be created by an agency or remain in the possession of the agency in order to qualify as 'intra-agency.' " *Id.* at 130. To exemplify this principle, the court quoted *Ryan*'s dispositive determination: "When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." *Ryan*, 617 F.2d at 790, *quoted in Judicial Watch*, 412 F.3d at 130 (concluding that "[n]ot to treat in the same way documents shared with or received from the NEPDG, a body established by the President solely to advise him, and composed entirely of federal officials, would be anomalous in-

deed." (internal citation omitted)). We base our decision here on the same "well established" principle.

Notwithstanding this court has itself affirmed post-*Klamath* the continuing validity of the *Ryan* line of cases, NIMJ offers two particular arguments to support its view that *Klamath* supersedes Circuit precedent. We find neither one persuasive.

First, NIMJ contends that the *Klamath* Court's admonition to give "independent vitality" to the statutory terms "inter-agency" and "intra-agency" forecloses exempting documents an agency receives from private citizens as such records are neither inter- nor intra-agency. Contrary to NIMJ's contention, our continued adherence to the consultant corollary does not diminish the "independent vitality" of the statutory terms, as we made clear in *Judicial Watch*. In *Ryan* we explained that "[i]n the course of its day-to-day activities, an agency often needs to rely on the opinions and recommendations of temporary consultants, as well as its own employees," 617 F.2d at 789, and it is "entirely reasonable" to adopt a "common sense interpretation of 'intra-agency' " that encompasses the advice submitted by such temporary consultants. In this case, DoD itself solicited the advice contained in the documents from the individual nongovernmental lawyers for the agency's own use in promulgating terrorist trial commission regulations. Under such circumstances, it is consistent with *Ryan*'s "common sense" interpretation to deem the documents "intra-agency" so as to come within Exemption 5's protection. And it is likewise consistent with *Klamath*'s directive to hew to the language of the statute. Indeed, *Klamath* itself acknowledges that disinterested outside consultants "may be enough like the agency's own personnel to

justify calling their communications intra-agency." 532 U.S. at 12.[10]

Second, NIMJ contends that *Klamath* expressly calls into question the holdings in *Ryan* and *Public Citizen*. It is true that the Court in *Klamath* stated that the two decisions "arguably extend beyond what we have characterized as the typical examples" of agency consultants but, consistent with its reasoning in the case before it, the Court expressed concern only with regard to the potential self-interests of the "consultants" involved in those cases. *See Klamath*, 532 U.S. at 12 n.4 (noting the former presidents in *Public Citizen* "had their own, independent interests" and in *Ryan*, the senators' questionnaire responses were held exempt "even though we would expect a Senator to have strong personal views on the matter"). As we have already noted, however, there is no dispute that the individuals DoD consulted were not pursuing interests of their own so as to run afoul of *Klamath*'s concern. Thus, the extent to which either *Ryan* or *Public Citizen* may have extended Exemption 5 beyond its permissible scope based on their peculiar facts is an issue we need not and do not decide here.

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[10] The dissent seems to suggest that the people consulted must themselves be "within" the agency, *see* Dissent at 10, but the statute requires only that the withheld documents ("memorandums or letters") be "intra-agency." Consultants are in some sense necessarily "outside" rather than "inside" the agency but the documents they produce may nonetheless qualify as "intra-agency" documents. *See Klamath*, 532 U.S. at 10 (noting that in circuit consultant corollary decisions "the records submitted by *outside* consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done") (emphasis added).

In applying the *Ryan* line of cases, we emphasize two factors in their analyses that support our continued application of the consultant corollary. First, as our cases make clear, the expectation that communications will remain confidential is crucial to eliciting candid and honest advice from outside consultants. *See Ryan*, 617 F.2d at 789-90 ("[C]onsultations [with temporary consultants] are an integral part of [an agency's] deliberative process; to conduct this process in public view would inhibit frank discussion of policy matters and likely impair the quality of decisions."); *Formaldehyde Inst.*, 889 F.2d at 1122 ("A predecisional document is a part of the '*deliberative process*,' if 'the disclosure of [the] materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.' " (quoting *Dudman Commc'ns Corp.* v. *Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987))) (emphasis and alteration in *Formaldehyde Inst.*); *Pub. Citizen*, 111 F.3d at 170 ("[F]or a President to be able to give adequate assurances of confidentiality to his advisors, the assurances must last beyond his tenure."); *Judicial Watch*, 412 F.3d at 129 (Exemption 5's "inclusion in the statute 'reflect[s] the legislative judgment that the quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas on legal or policy matters would be impossible.' " (quoting *Tax Analysts* v. *IRS*, 117 F.3d 607, 617 (D.C. Cir.1997)) (alteration in *Judicial Watch*); *see also NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (" '(h)uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for

appearances . . . to the detriment of the decisionmaking process' " (quoting *United States* v. *Nixon*, 418 U.S. 683, 705 (1974)) (alteration in *Sears*)); *see also* Hecker Decl. 3 ("The public disclosure of these materials would discourage the frank, open discussions on these issues by these individuals.").

Second, throughout the *Ryan* line of cases, there have been some indicia of a consultant relationship between the outsider and the agency. Typically the relationship is evidenced by the fact that the agency seeks out the individual consultants and affirmatively solicits their advice in aid of agency business, as DoD did here. *See Ryan*, 617 F.2d at 790 ("When an agency record is submitted by outside consultants as part of the deliberative process, *and it was solicited by the agency*, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5." (emphasis added)); *id.* ("We cannot overlook the fact that the documents here were generated by an initiative from the Department of Justice, *i.e.*, the questionnaire sent out by the Department to the Senators."); *Formaldehyde Inst.*, 889 F.2d at 1122 ("[I]t is unquestionably true that efficient government operation requires open discussions among all government policy-makers and advisors, whether those giving advice are officially part of the agency *or are solicited to give advice* only for specific projects." (emphasis added; internal quotation omitted)).[11] The dissent is therefore wrong to sug-

[11] In *Formaldehyde Institute*, the court rejected the FOIA requester's contention that Exemption 5 did not apply because "the outside reviews were not 'solicited' by HHS," explaining:

> [I]t is an undisputed fact that "receipt of comments [from outside reviewers] is an expected result in the

gest, *see* Dissent at 10-11, that our cases allow an agency merely to ask the general public for advice at a press conference or in the Federal Register and then to classify the resulting responses as "intra-agency" documents; nothing in our cases (including today's decision) even remotely supports the view that such circumstances would establish a consultant relationship between the agency and each individual. In addition, we do not see how the advice here would be any more "intra-agency," as the dissent suggests, were the individuals consulted classified as "committee" members or paid nominal stipends. *See* Dissent at 3, 10, 14-15. It was DoD's formal solicitation of their advice (with or without nominal pay or title) that created a consultant relationship and made them analogous to agency employees and documents containing their advice "intra-agency." We need not decide how Exemption 5 might apply to *any* agency solicitation for advice; this case involves the solicita-

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submission of an article for publication." Furthermore, it is undisputed that reviewers' comments are "expected to be confidential." The agency does not "solicit" reviews in the sense that it contracts to receive them, but it does actively seek to do business with journals from which reviews are both expected and then used by CDC to determine whether and in what form to publish articles in the name of the agency. This arrangement reflects a mutual understanding between the agency and journals that provide confidential reviews regarding how the agency will use the reviews. The existence of such an arrangement is more than enough to hold that the Review Letter is a part of the deliberative process of the agency.

889 F.2d at 1124 (record citations omitted) (alterations added).

tion of advice from a discrete group of experts, not from "thousands of citizens." *See* Dissent at 11.

The dissent alleges that our reliance, in this case, on formal agency solicitation of advice from a discrete group of experts (consistent with Circuit precedent) presents a "fundamental problem" because these "principles . . . have no basis in Exemption 5's text." Dissent at 11. But the dissent itself offers no anchoring in the text for a bright-line rule requiring that an agency provide consultants with nominal payment or membership on a nominal committee if it wishes to consider documents containing their advice "intra-agency." Nor does it explain how the text of Exemption 5 limits the volunteer consultants who can produce intra-agency documents to those on committees created under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 §§ 1-16 (nor, indeed, on the dissent's reading of *Klamath*, how it authorizes treatment of FACA-compliant consultants as "intra-agency"). Indeed, while the dissent is troubled by a belief that our analysis would *permit* advice to be solicited by e-mail from "every law professor in the country," Dissent at 11, and come within Exemption 5 (a scenario we expressly do not reach, see *supra* p. 19), the dissent's own analysis would seem to *require* us to extend Exemption 5 to such a case so long as the agency's e-mail invited "every law professor" to join an "Ad Hoc Committee for Advice on Legal Compliance" and indicated that a professor who provided responsive comments would thereby consent to membership on the Committee. There is nothing in the text of Exemption 5 that would require such; what matters is the nature of the relationship between the consultant and the agency, not the formalities observed.

For the foregoing reasons, we conclude that the nineteen documents NIMJ seeks are exempt from disclosure under FOIA Exemption 5. 5 U.S.C. § 552(b)(5). Accordingly, the judgment of the district court is affirmed.

So ordered.

TATEL, *Circuit Judge*, dissenting: In November 2001, President Bush issued a military order authorizing the Department of Defense to create military commissions to try suspected terrorists. DoD then sought advice about how to implement the order from legal luminaries outside the agency, including Bernard Meltzer, Lloyd Cutler, Ruth Wedgwood, Newton Minow, Terrence O'Donnell, William Coleman, Geoffrey Hazard, William Webster, Martin Hoffman, Jack Goldsmith, and Joseph Tompkins. In response, these outside experts sent letters, faxes, or emails to DoD. All were unpaid volunteers and none were appointed by DoD to any type of committee, task force, or other position, or made a part of DoD in any other way. Nonetheless, the district court held—and now this court agrees—that these documents are "intra-agency memorandums or letters" protected from public disclosure under Exemption 5 of the Freedom of Information Act. Despite the textual implausibility of this holding, I acknowledge that this court's precedent makes this a close case. As a policy matter, moreover, I agree with my colleagues that agencies will obtain more and better advice from outsiders if able to promise confidentiality. But I must respectfully dissent because I believe the court's holding does exactly what the Supreme Court forbade in *Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001): it makes "'intra-agency' . . . a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." *Id.* at 12.

I.

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires agencies to release all records upon public request unless they fall within an exemption enumerated in the Act. *Klamath*, 532 U.S. at 7.

These exemptions "must be narrowly construed," and "do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Dep't of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976).

DoD withheld the documents at issue here under FOIA Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it," such as the attorney-client, deliberative process, or attorney work product privileges. *Klamath*, 532 U.S. at 8. Because appellant National Institute of Military Justice concedes that these documents fall within the deliberative process privilege, the only question before us is whether they qualify as "intra-agency."

In answering this question, the court turns immediately to our precedent, but I begin with the statute's text. The prefix "intra" means "within." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1185 (1993); *accord* BLACK'S LAW DICTIONARY 841 (8th ed. 1999). Thus, "the most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." *Klamath*, 532 U.S. at 9 (quoting *DOJ* v. *Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)). That said, several courts of appeals, including this one, "have held that [Exemption 5] extends to communications between Government agencies and outside consultants *hired* by them." *Id.* at 10 (emphasis added). For example, in *Hoover* v. *De-*

partment of Interior, 611 F.2d 1132 (5th Cir. 1980), the Fifth Circuit held that Exemption 5 protected a memo prepared for the agency by a consultant it hired to appraise a piece of property it wanted to buy. Similarly, in *Government Land Bank* v. *General Services Administration*, 671 F.2d 663 (1st Cir. 1982), the First Circuit held that Exemption 5 protected a property appraisal prepared for the agency by an outside consultant.

Cases like these, which apply Exemption 5 to protect documents written by paid outside consultants, certainly stretch the meaning of "intra-agency," arguably disregarding the Supreme Court's directive that FOIA exemptions "must be narrowly construed." *Rose*, 425 U.S. at 361. But they still plausibly interpret "intra-agency": when an agency hires consultants to perform a task, it's not unreasonable to say they have become part of the agency for purposes of that project, making any documents they produce for the project "intra-agency." One could even imagine situations in which a document written by a volunteer could plausibly be considered "intra-agency"—for example, if a person were appointed to a formal advisory committee created by an agency pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 §§ 1-16, and in that capacity wrote a memorandum to an agency employee. *Cf. Soucie* v. *David*, 448 F.2d 1067, 1077-78 & n.44 (D.C. Cir. 1971) (stating in dicta that a report prepared by outside experts formally appointed to a federal advisory panel might be protected under Exemption 5).

In this case, however, the government asks us to stretch Exemption 5 beyond its breaking point, to cover *everyone* an agency asks for advice. The government's argument flatly ignores the statute's text, as well as our obligation to construe FOIA exemp-

tions narrowly. Nonetheless, the government insists that our precedent requires the result it seeks, and this court now agrees, relying principally upon three cases from this circuit. Below I describe these cases and then explain why I believe *Klamath* undermines all of them.

The first case, *Ryan* v. *DOJ*, 617 F.2d 781 (D.C. Cir. 1980), involved questionnaires the Attorney General sent to members of the Senate asking how they chose whom to recommend for district court judgeships. *Id.* at 784. Responding to a FOIA request seeking the senators' responses, the Attorney General argued that the questionnaires were "intra-agency" documents protected by Exemption 5. This court agreed, explaining:

> Congress apparently did not intend "inter-agency" and "intra-agency" to be rigidly exclusive terms, *but rather to include any agency document that is part of the deliberative process.* We cannot overlook the fact that the documents here were generated by an initiative from the Department of Justice, i.e., the questionnaire sent out by the Department to the Senators. The Senators replied to the questionnaire. . . . When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an "intra-agency" memorandum for purposes of . . . Exemption 5.

Id. at 790 (emphasis added) (footnotes omitted).

In the second case, *Formaldehyde Institute* v. *Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989), an HHS scientist submitted an

article for publication in a peer-reviewed journal. After the journal gave the article to outside reviewers who recommended against publishing it, the journal sent a rejection letter, along with the comments of its reviewers, to the scientist and HHS. We held the comments protected under Exemption 5:

> The Institute argues, and the District Court concluded, that because the Journal is neither part of HHS nor one of HHS'[s] consultants, the Review Letter is not entitled to Exemption 5 protections. . . .
>
> . . . .
>
> . . . *Ryan* established, [however,] . . . that "inter-agency" and "intra-agency" are not rigidly exclusive terms, *but rather embrace any agency document that is part of the deliberative process.* Thus, both the Institute and the District Court err in focusing on the absence of any formal relationship between the Journal's reviewers and HHS.

Id. at 1123 (emphasis added) (citations and internal quotation marks omitted).

In the third case, *Public Citizen, Inc.* v. *DOJ*, 111 F.3d 168 (D.C. Cir. 1997), Public Citizen sought disclosure of letters sent by former Presidents Reagan and Bush to the National Archives and Records Administration regarding access to their presidential papers. We held the letters protected under Exemption 5:

> While Public Citizen is doubtless right that a former President is not an agency under FOIA, *records of communications between an agency and outside consultants qualify as "intra-agency " for purposes of Exemption 5 if they have been created for the purpose of aid-*

> *ing the agency's deliberative process.* It is irrelevant whether the author of the documents is a regular agency employee or a temporary consultant. Two circumstances make application of this doctrine to the disputed records peculiarly appropriate.
>
> First, the former President in this context can hardly be viewed as an ordinary private citizen. He retains aspects of his former role— most importantly, for current purposes, the authority to assert the executive privilege regarding Presidential communications. . . .
>
> . . . .
>
> Second, the consultative relationship involved here is not only explicit, but is mandated by statute. The Presidential Records Act establishes an elaborate structure for the management of Presidential records. The United States retains ownership, possession and control. But the President plays a significant role even after he leaves office.

Id. at 170-71 (emphasis added) (citations and internal quotation marks omitted).

As an initial matter, *Public Citizen* and *Ryan* are distinguishable from this case. In *Public Citizen* we relied heavily on two facts not present here: former Presidents are still part of the government in many ways, and a statute expressly required the National Archives and Records Administration to consult with them. Both facts made it more plausible than it is here to call the documents at issue "intra-agency." And in *Ryan* the "outsiders" offering comments were U.S. senators, making it more reasonable to consider their comments "inter-agency or intra-agency."

That said, were *Public Citizen*, *Ryan*, and *Formaldehyde* the only cases on point, we would undoubtedly have to rule for DoD based on the broad principles we announced in these cases. All three cases say it makes no difference whether the documents at issue were generated by someone within the agency. All that matters, they hold, is that the documents played a role in the agency's deliberative process, a standard indisputably met here.

The problem with these cases, however, is that in *Klamath* the Supreme Court rejected exactly this type of reasoning. In *Klamath*, Indian tribes were communicating with the Department of Interior about their interests during upcoming federal and state water allocation decisions. The government argued that its communications with the tribes enjoyed Exemption 5 protection because confidential communications with the tribes were crucial to the agency's deliberative process. Flatly rejecting this argument, the Supreme Court explained: "the first condition of Exemption 5 is no less important than the second; *the communication must be 'inter-agency or intra-agency.'*" 532 U.S. at 9 (quoting 5 U.S.C. § 552(b)(5)) (emphasis added). The Court thus chided the government for making a fundamental error:

> [T]he Department's argument skips a necessary step, for it ignores the first condition of Exemption 5. . . . The Department seems to be saying that "intra-agency" is a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential.
>
> *There is, however, no textual justification for draining the first condition of independent vitality . ...*

Id. at 12 (emphasis added).

The Court then went on to decide *Klamath* on a narrow ground. While acknowledging that some courts of appeals had "held that [Exemption 5] extends to communications between Government agencies and outside consultants *hired* by them," *id.* at 10 (emphasis added), the Court expressly declined to decide whether consultants' reports generally "may qualify as intra-agency under Exemption 5," *id.* at 12. Instead, it held that even if some communications from paid consultants could qualify for Exemption 5 protection, communications from the tribes in *Klamath* could not because unlike the typical consultant, who "does not represent an interest of its own ... when it advises the agency that hires it," *id.* at 11, the tribes, in their communications with the Department of Interior, were representing their own interests, *id.* at 14.

Klamath thus presents us with a dilemma. While leaving open the possibility that some communications from consultants may qualify for Exemption 5 protection, the decision also makes clear that "the first condition of Exemption 5 is no less important than the second; *the communication must be 'inter-agency or intra-agency.'*" *Id.* at 9 (quoting 5 U.S.C. § 552(b)(5)) (emphasis added). *Klamath* also warns that "[t]here is . . . no textual justification for draining the first condition of independent vitality." *Id.* at 12. Thus, our earlier cases protecting communications from outside consultants under Exemption 5 remain good law only to the extent they give "independent vitality" to the meaning of "intra-agency."

In my view, none of the cases the court relies on passes this test. In *Ryan*, the court held, in language this court never mentions: "Congress apparently did not intend 'inter-agency' and 'intra-agency' to be rig-

idly exclusive terms, *but rather to include any agency document that is part of the deliberative process.*" 617 F.2d at 790 (emphasis added). *Formaldehyde* holds exactly the same thing: "'Inter-agency' and 'intra-agency' are not rigidly exclusive terms, *but rather embrace any agency document that is part of the deliberative process.*" 889 F.2d at 1123 (citing *Ryan*, 617 F.2d at 790) (emphasis added); *see also Dow Jones & Co.* v. *DOJ*, 917 F.2d 571, 575 (D.C. Cir. 1990) ("*Ryan* (and *Formaldehyde*), then, stand for the proposition that Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of *the agency's* deliberative process."). And *Public Citizen* holds that "records of communications between an agency and outside consultants qualify as 'intra-agency' for purposes of Exemption 5 if they have been 'created for the purpose of aiding the *agency's* deliberative process.'" 111 F.3d at 170 (quoting *Dow Jones*, 917 F.2d at 575). All three cases thus define "intra-agency" documents as those that play a role in the agency's deliberative process, regardless of their source. Yet such reasoning is precisely what *Klamath* rejects: the "argument skips a necessary step, for it ignores the first condition of Exemption 5" and makes "'intra-agency' . . . a purely conclusory term." 532 U.S. at 12.

Despite this crucial language from *Klamath*, the court holds that our earlier cases "compel us to conclude that documents such as the ones here—submitted by non-agency parties in response to an agency's request for advice—are covered by Exemption 5." Majority Op. at 9. The court derives this test from *Ryan*'s statement that "[w]hen an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the

agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of . . . Exemption 5." 617 F.2d at 790. According to the court, this test from *Ryan* survives *Klamath* because it somehow gives "independent vitality" to "intra-agency." I would agree if the court read this passage from *Ryan*—and limited its holding here—to mean that Exemption 5 protects documents agencies solicit from people who could plausibly be called "intra-agency," such as paid consultants or members of official agency committees created under FACA. The problem, however, is that the court holds that a document qualifies as "intra-agency" if an agency solicits it from *anyone*.

Rather than giving "independent vitality" to "intra-agency," this test redefines that term. "Intra" means "within," and "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)). In enacting FOIA, Congress gave no indication that it intended a previously unheard of definition of "intra," so we are bound by the normal meaning of the term. See *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984) (stating that "compelling evidence of congressional intent . . . would be necessary to persuade us to look beyond the plain statutory language" of Exemption 5).

The court nonetheless holds that "documents . . . submitted by non-agency parties in response to an agency's request for advice" are "intra-agency," Majority Op. at 9, effectively declaring that people come "within" an agency once the agency asks for their opinions. In my view, this does not represent a

"common sense interpretation of 'intra-agency.'" *Id.* at 15 (quoting *Ryan*, 617 F.2d at 790). Indeed, under the court's rule, if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as "intra-agency." Seeking to escape this untenable result, the court adds a new requirement: the solicitation must be "formal." *Id.* at 19. Requiring formality, however, does nothing to prevent absurd results. For example, an agency request for advice published in the Federal Register would be "formal," but hardly enough to make letters sent by members of the public who responded "intra-agency." Perhaps by "formal" the court means individualized, but if an agency sent personalized letters to thousands of citizens asking for advice, no one could plausibly call their responses "intra-agency." The court next suggests that a solicitation suffices if addressed to a "discrete group of experts." *Id.* But a DoD request for advice to every law professor in the country would qualify as a request to a "discrete group of experts," yet the professors' responses plainly would not be "intra-agency." Apparently unable to distinguish away this ridiculous consequence of its rule, the court instead attacks my reading of the statute as lacking any basis in Exemption 5's text and leading to equally absurd results. *Id.* The court is incorrect on both counts.

My discussion of the plausible outer limits of Exemption 5—as possibly including some paid consultants and unpaid members of official agency committees—flows directly from the statute's text: it rests on the "ordinary, contemporary, common meaning" of "intra-agency." *Pioneer*, 507 U.S. at 388. That is, as I explained above, one can plausibly say that some paid consultants and members of official agency committees have come "within" the agency. By contrast,

the principles the court develops in response to the troubling examples in the previous paragraph have no basis in Exemption 5's text. An agency's mere request for advice, no matter how formal or selective, has nothing to do with whether a person's response comes from within or outside the agency. Without some indicia that the person responding is "within" the agency, such as a paid consulting contract, "intra-agency" has no meaning. Moreover, contrary to the court's claim, nothing I have said even suggests a "bright-line rule" that any person who receives "nominal payment" or is a member of a "nominal committee" qualifies as "intra-agency." Majority Op. at 19. I have said only that *at least some* paid consultants and members of formally created agency committees could plausibly qualify as "intra-agency." If, as the court hypothesizes, an agency called law professors "committee members" merely because it asked for their advice once, *id.* at 20, they would not qualify as "intra-agency." This ruse would fail not only because it would amount to a transparent attempt to game Exemption 5, but also because there would be no meaningful indicators that the professors had actually come within the agency, such as might exist for members of official agency committees that meet and consult regularly with agency officials. Making matters even worse, such a "committee" would violate FACA in several ways, including that it would have been created neither by statute nor agency order published in the Federal Register. 5 U.S.C.App. 2 § 9(a). In the end, however, I need not address every such hypothetical, for regardless of where we ultimately establish the outer boundaries of "intra-agency," *here* it is crystal clear that the experts who submitted comments do not qualify.

Of course, I understand the court's desire to interpret Exemption 5 to accomplish what it perceives to be that exemption's goal, but we may not use statutory purpose to produce an unreasonable interpretation. *See Freeman* v. *B & B Assocs.*, 790 F.2d 145, 149 (D.C. Cir. 1986) ("[W]e will not ignore the words of the statute in pursuit of some disembodied congressional purpose."). "[T]hat Congress might have acted with greater clarity or foresight" by protecting some communications from outside volunteers "does not give [this] court[ ] a *carte blanche* to redraft [the] statute[ ] in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985).

In any event, looking to FOIA's purpose gives no clear answer to the question before us. Congress certainly intended Exemption 5 to ensure that agencies not "operate in a fishbowl," H.R. REP. NO. 89-1497, at 10 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 2418, 2427, but it also "attempted to delimit the exception as narrowly as consistent with efficient Government operation," S. REP. NO. 89-813, at 9 (1965), suggesting that Congress never intended courts to expand the exemption beyond its terms. What's more, "disclosure, not secrecy, is the dominant objective of [FOIA]." *Rose*, 425 U.S. at 361. Because FOIA thus embodies conflicting purposes, we must presume that Congress used language it believed properly reconciled these goals. "[D]eference to the supremacy of the Legislature, as well as recognition that [members of Congress] typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *Locke*, 471 U.S. at 95 (quoting *Richards* v. *United States*, 369 U.S. 1, 9 (1962)).

Finally, and crucially, the court's definition of "intra-agency" disregards the Supreme Court's command that FOIA exemptions "be narrowly construed," *Rose*, 425 U.S. at 361, and "read strictly in order to serve FOIA's mandate of broad disclosure," *Klamath*, 532 U.S. at 16. Whatever the policy merits of the court's interpretation of "intra-agency," it is far from narrow or strict.

Despite these problems with its approach, the court maintains that our precedent demands its result. It offers a number of reasons for this conclusion, each of which I think flawed.

To begin with, the court finds "no basis to jettison our binding circuit precedent," Majority Op. at 11, because *Klamath* never determined whether consultants' reports "may qualify as intra-agency under Exemption 5," 532 U.S. at 12. But *Klamath* did decide that courts may not "ignore the first condition of Exemption 5" and make "'intra-agency' . . . a purely conclusory term," *id.*—precisely what this court did in *Ryan*, *Formaldehyde*, and *Public Citizen*. Thus, the test set forth in *United States* v. *Williams*, 194 F.3d 100 (D.C. Cir. 1999), upon which the court relies, Majority Op. at 12 n.7, is met here because *Klamath* "eviscerates" the reasoning in the Ryan line of cases. *Williams*, 194 F.3d at 105. Indeed, Klamath so clearly undermines *Formaldehyde* that even under the expansive definition of "intra-agency" the court adopts today, *Formaldehyde* would have come out the opposite way, for there the agency did not solicit the documents it sought to protect—rather, an outside journal solicited the comments and later gave them to the agency. This highlights just how much Klamath has already "jettison[ed] our binding circuit precedent." *See In re Sealed Case*, 352 F.3d 409, 412 (D.C. Cir. 2003) ("[A] three-judge panel may always

. . . determine . . . that a prior holding has been superseded, and hence is no longer valid as precedent." (citations and internal quotation marks omitted)).

Next, the court insists it is irrelevant that the individuals who offered advice to DoD were "private citizens rather than government employees or paid contract consultants," saying "we see no reason why the absence of a contract or compensation should differentiate them from the 'typical' outside agency consultants." Majority Op. at 13. But the lack of a contract or compensation matters. For one thing, contracting with and paying a consultant establishes a formal relationship between that person and the agency, making it at least plausible to consider the person "intra-agency." In contrast, the court allows agencies to describe anyone they ask for advice as "consultants," never explaining how private citizens can reasonably be described as "intra-agency" merely because an agency asks for their views. Moreover, although the court seeks support for its holding in *Klamath*'s statement that outside consultants "may be enough like the agency's own personnel to justify calling their communications 'intra-agency,'" Majority Op. at 16 (quoting *Klamath*, 532 U.S. at 12), it ignores that *Klamath* was referring to "communications between Government agencies and outside consultants *hired* by them." 532 U.S. at 10 (emphasis added); *see also id.* ("[T]he consultants in these cases were independent contractors . . . .").

Lastly, the court believes that our post-*Klamath* decision in *Judicial Watch, Inc.* v. *Department of Energy*, 412 F.3d 125 (D.C. Cir. 2005), reaffirms *Ryan*, *Formaldehyde*, and *Public Citizen*. But this reading overstates our holding in *Judicial Watch*. There we held that although the National Energy Policy Development Group (NEPDG)—a body composed en-

tirely of federal employees from many agencies who advised the president on energy policy—was not an agency within the meaning of FOIA, Exemption 5 still protected documents created or received by the group as part of its deliberative process. Our rationale, however, was not that it was irrelevant whether the documents were "intra-agency." Instead, we held that because the federal employees who made up the NEPDG were advising the President, they were, in effect, part of the President's staff, and their documents were therefore protected under earlier decisions holding that documents prepared by presidential staff enjoy Exemption 5 protection. *See id.* at 129 ("Neither Exemption 5 nor the cases interpreting it distinguish between the decision-making activities of an 'agency' subject to the FOIA and those of the President and his staff ...").

To be sure, after reaching this conclusion we went on to note, in language the court cites, that our holding was "not inconsistent with [Exemption 5's] textual limitation to 'intra-agency' or 'inter-agency' communications," because in *Ryan* and other cases we had established "that a document need not be created by an agency or remain in the possession of the agency in order to qualify as 'intra-agency.'" *Id.* at 130. As an example of this principle, we pointed to *Ryan*'s statement quoted above: "When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of ... Exemption 5." *Id.* (quoting *Ryan*, 617 F.2d at 790). In citing this passage from *Ryan*, however, we could not possibly have been *holding* that documents solicited from outside volunteers qualify as "intra-agency," for no such docu-

ments were at issue in *Judicial Watch*. All we actually held is something undisputed here: that at least some documents created by people other than agency employees may qualify as "intra-agency." Moreover, as explained above, reading this statement to apply to documents solicited from *anyone* fails to account for *Klamath*; it redefines "intra-agency" rather than giving the term "independent vitality."

II.

Whether agencies should be able to withhold communications they solicit from outside volunteers is a difficult policy question about which reasonable people disagree. The National Institute of Military Justice argues that allowing agencies to withhold such communications will allow "secret participation by members of the public in critical agency rulemaking processes." Appellant's Opening Br. 21. The government and this court respond that allowing agencies to promise confidentiality will encourage candid advice from outside advisors and thus improve agency decisionmaking.

As a policy matter, I agree with my colleagues. Agencies will obtain better advice if they can promise confidentiality to outside volunteers whose views they solicit, and I think the benefits of such advice will outweigh the cost in lost transparency. But my view on this issue is not the one that matters. The proper way to resolve this policy issue is not for this court to stretch Exemption 5's words to cover whatever it thinks they should, but rather for Congress to hold hearings, determine whether it wishes to protect communications from outside volunteers, and modify Exemption 5's language accordingly.

We find ourselves in a situation similar to that we faced in *Dow Jones & Co.* v. *DOJ*, 917 F.2d 571

(D.C. Cir. 1990). There we said: "It may well be true that if Congress had thought about this question, the Exemption would have been drafted more broadly to include [communications like this one]. But Congress did not, and the words simply will not stretch to cover this situation ... ." *Id.* at 574. Because Exemption 5's words "simply will not stretch to cover this situation," *id.*, and because the result the court reaches contravenes *Klamath*, I would reverse the district court and direct DoD to make these documents public.

APPENDIX B

NATIONAL INSTITUTE OF MILITARY JUSTICE, PLAINTIFF,
V.
U.S. DEPARTMENT OF DEFENSE, DEFENDANT.

Civil Action No. 04-312 (RBW)

MEMORANDUM OPINION

The plaintiff has filed this lawsuit alleging that the defendant impermissibly withheld documents requested pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (2000). Complaint ("Compl.") ¶ 1. Currently before the Court are the parties' cross-motions for summary judgment.[1] For the reasons set forth below, this Court grants in part, and denies in part, both parties' motions.

II. Background

The facts in this case are not largely in dispute and are the following. On November 13, 2001, the President of the United States issued a Military Or-

[1] The following papers have been submitted in connection with these motions: (1) Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Def.'s Mem."); (2) Plaintiff's Memorandum in Opposition to Defendant's Second Motion for Summary Judgment and in Support of Plaintiff's Second Cross-Motion for Summary Judgment ("Pl.'s Mem."); (3) Reply to Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Cross Motion for Summary Judgment ("Def.'s Opp'n"); and (4) Plaintiff's Reply to Defendant's Opposition to Plaintiff's Second Cross Motion for Summary Judgment ("Pl.'s Reply").

der authorizing the establishment of military commissions to try suspected terrorists. Pl.'s Mem. at 3 (citing 66 Fed. Reg. 57,833 (Nov. 16, 2001)). Section 4 of this Order directed the Secretary of the Department of Defense ("Secretary") to issue regulations to implement the President's Military Order. *Id.* Pursuant to this provision, the Secretary began the process of promulgating regulations to establish the military commissions. And, on July 1, 2003, the Secretary published in the federal register the final rules establishing the procedures for conducting the military commissions. *Id.* (citing 68 Fed. Reg. 39,374 (July 1, 2003)). According to the plaintiff, the Department of Defense ("DoD"), during the internal drafting process of the regulations, received comments and advice from non-agency attorneys and the general public on the draft regulations. *Id.* at 3-4. These comments form the basis of the plaintiff's FOIA request that is at issue in this case.

The plaintiff, the National Institute for Military Justice ("NIMJ"), is a nonprofit corporation that provides information to the public about military justice. Compl. ¶ 3. On October 3, 2003, the plaintiff submitted a request pursuant to the FOIA for

> all written or electronic communications that the Department (including the Secretary and General Counsel) has either sent to or received from anyone (other than an officer or an employee of the United States acting in the course of his or her official duties) regarding the President's November 13, 2001 Military Order, the Secretary's Military Commission Orders, and the Military Commission Instructions. This requests includes but is not limited to suggestions or comments on

> potential, proposed, or actual terms of any of those Orders or Instructions and any similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted.

Compl. ¶ 5. Upon receipt of the plaintiff's FOIA request, the defendant directed it to two offices of the Secretary likely to have documents responsive to the request—(1) the Correspondence and Directives Division of a support organization, the Washington Headquarters Services, and (2) the Office of the General Counsel. Def.'s Mem. at 2. The search in the Office of the General Counsel was focused primarily in the Office of Military Commissions and the Office of the Deputy General Counsel. *Id.* On November 18, 2003, the defendant made an "interim" response to the plaintiff's request that resulted in the release of some, but not all, of the requested documents.[2] Compl. ¶ 6. The plaintiff administratively appealed the defendant's response, *id.* ¶ 7, and on February 26, 2004, after the defendant failed to timely respond to the appeal, *id.* ¶ 8, the plaintiff commenced the action that is presently before this Court. After an initial round of summary-judgment briefing in this case commenced, the defendant undertook a new search for responsive documents. Def.'s Mem. at 3. This new search was conducted in more offices than the previous search and used different search criteria, which resulted in a much broader search for responsive documents. *Id.* Specifically, this expanded search included searches of: (1) the files of the Legal Counsel; (2) the correspondence files of the General

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[2] Additional documents from this initial search were released on June 4, 2004, following the commencement of this action. Def.'s Mem. at 3.

Counsel; (3) the files of the Deputy Secretary of Defense; (4) the files of the Under Secretary of Defense for Policy; (5) the files of the Office of Detainee Affairs; and (6) the files of the Office of Public Inquiries and Analysis. *Id.* at 3. Moreover, former employees were contacted who might have knowledge of the location of potentially responsive documents. *Id.* This search resulted in the discovery of thousands of pages of responsive documents, which, to the extent the defendant claims is permissible under the FOIA, have been released. *Id.* at 4.

On March 9, 2005, the defendant filed a second motion for summary judgment along with an index produced pursuant to *Vaughn* v. *Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), which provides the defendant's justifications for withholding all or part of 87 documents. Def.'s Mem., Ex. 11 (*Vaughn* index). In the papers currently before the Court, the defendant contends that it has properly withheld all or part of these documents pursuant to FOIA exemptions (b)(3), (b)(5), and (b)(6), and that its search was adequate to discover all responsive documents. *Id.* at 4-6. Accordingly, the defendant argues that it is entitled to summary judgment. The plaintiff, however, contends that the defendant's search was not adequate, and that many of the documents that were discovered have been improperly withheld under exceptions (b)(3) and (b)(5). Pl.'s Mem. at 1-2.

III. Standard of Review

A. Federal Rule of Civil Procedure 56(c)

This Court will grant a motion for summary judgment under Rule 56(c) if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When ruling on a motion for summary judgment, this Court must view the evidence in the light most favorable to the non-moving party. *VoteHemp, Inc.* v. *Drug Enforcement Admin.*, 237 F. Supp. 2d 55, 59 (D.D.C. 2002) (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986)). However, the non-moving party cannot rely on "mere allegations or denials ... but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted); *see also Fisher* v. *Nat'l Institutes of Health*, 934 F. Supp. 464, 467-68 (D.D.C. 1996) (quoting *Anderson*, 477 U.S. at 248).

B. Summary Judgment in FOIA Cases

The 'burden is on the agency' to show that the requested material falls within a FOIA exemption." *Petroleum Info. Corp.* v. *Dep't of the Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992) (quoting 5 U.S.C. § 552(a)(4)(B)). Agencies typically submit affidavits and a *Vaughn* index to satisfy this burden, which sets forth a description of each withheld document, the exemption claimed for withholding the document, and reasons supporting the application of the exemption to the withheld material. *Vaughn*, 484 F.2d at 827; *King* v. *Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987); *Weisberg* v. *Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). This index must be sufficiently detailed to allow a court to determine whether the claimed exemptions apply to the withheld documents. *Oglesby* v. *U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Moreover, a court

may rely on affidavits provided by an agency in granting summary judgment "if the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). These statements by the agency "cannot support summary judgment if they are 'conclusory, merely reciting statutory standards, or if they are too vague or sweeping.'" *King*, 830 F.2d at 219 (citations omitted). While the District of Columbia Circuit has not defined what constitutes a conclusory statement, it has concluded that "where no factual support is provided for an *essential* element of the claimed privilege or shield, the label 'conclusory' is surely apt." *Senate of the Commonwealth of Puerto Rico* v. *Dep't of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987) (emphasis in original). In addition, "[w]hile an agency's affidavits are presumed to be in good faith, a plaintiff can rebut this presumption with evidence of bad faith." *Gutman* v. *Dep't of Justice*, 238 F. Supp. 2d 284, 290 (D.D.C. 2003). Thus, to determine whether a court should grant summary judgment in a FOIA action, the court must determine whether undisputed material facts, as shown by exhibits, affidavits, and/or the *Vaughn* index, show that each requested document has been produced, is unidentifiable, or is exempt from disclosure. *Students Against Genocide* v. *Dep't of State*, 257 F.3d 828, 833 (D.C. Cir. 2001); *Weisberg* v. *Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

As already noted, the defendant contends that it has properly withheld responsive documents pursuant to FOIA exemptions (b)(3), (b)(5), and (b)(6), and that its search was adequate. Def's Mem. at 4. On the other hand, the plaintiff takes exception to each of the defendant's positions.[3] Pl.'s Mem. at 1-2. The Court will address the plaintiff's challenges in turn.

IV. Legal Analysis

A. The Defendant's Search

The plaintiff first argues that its "FOIA request has been infected by either bad faith or incompetence" and thus, the defendant has a heavier burden to carry in establishing that it has complied with the requirements of the FOIA. Pl.'s Mem. at 11. The plaintiff advances two examples to illustrate this point. First, the plaintiff opines that the defendant failed to initially include comments from non-agency lawyers as responsive to its FOIA request. *Id.* The plaintiff suggests that this was inexcusable, and cannot simply be attributed to inadvertence or oversight, since those documents were clearly responsive to its request. *Id.* As support for its position, the plaintiff directs the Court to the acknowledgment and praise made by the Secretary at a press conference concerning the advice and comments provided by these attorneys. *Id.* at 12. According to the plaintiff, the defendant's failure to produce these documents demonstrates an "indifference to the commands of FOIA," and shows that the delay in the re-

[3] The plaintiff does not, however, challenge the defendant's withholding of documents pursuant to exemption (b)(6), Pl.'s Mem. at 2 & n.7. Accordingly, the Court need not address whether it was proper to withhold those documents under this exemption.

lease of these documents is indefensible. *Id.* at 13-14. Second, the plaintiff posits that there are inconsistences between the defendant's decision to release certain documents while failing to release others. *Id.* at 14-15. Specifically, the plaintiff directs the Court to instances where the defendant released documents containing comments from the general public, but withheld documents containing the views of non-agency attorneys. *Id.* Moreover, the plaintiff notes that the defendant released three documents containing the views of non-agency attorneys, but withheld documents containing the views of other such attorneys. *Id.* These inconsistencies, the plaintiff opines, demonstrate that the defendant's response to the plaintiff's FOIA request was made in bad faith. *Id.* at 14-16. The defendant contends, however, that based on the affidavits presented to the Court and the evidence in the record, there has been no showing of bad faith, inconsistency, or incompetence on its part. Def.'s Opp'n at 2-3. This Court agrees with the defendant's positions for the reasons set forth below.

The plaintiff's first challenge to the defendant's failure to account for allegedly responsive documents in its initial FOIA search is essentially an attack on the adequacy of the defendant's search based on a claim that it was conducted in bad faith.[4] The FOIA requires an agency defendant to show "beyond material doubt" that it has conducted a search reasonably calculated to uncover all relevant documents. *Weisberg*, 705 F.2d at 1351. As the District of Columbia

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[4] The plaintiff also challenges the overall adequacy of the search. This position is addressed more fully in a subsequent section of this opinion. *See infra* Section III.E at 35-37.

Circuit has made clear, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Id.* (quoting *Perry* v. *Block*, 684 F.2d 121, 128 (D.C. Cir. 1982) (per curiam) (emphasis in original)). "The adequacy of an agency's search is measured by a 'standard of reasonableness' and is 'dependent upon the circumstances of the case.'" *Id.* (quoting *McGehee* v. *CIA*, 697 F.2d 1095, 1100-01 (D.C. Cir. 1983); *Founding Church of Scientology* v. *NSA*, 610 F.2d 824, 834 (D.C. Cir. 1979)). To establish that an agency has conducted an adequate search, the government may rely on affidavits, as long as they are "reasonably detailed . . . setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Valencia-Lucena* v. *United States Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Oglesby* v. *Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1980)); *see also Weisberg*, 705 F.2d at 1351 ("The government may rely upon affidavits to show it has conducted a reasonable search, as long as they are 'relatively detailed and nonconclusory and ... submitted in good faith.") (quoting *Goland* v. *CIA*, 607 F.2d 339, 367, 369 (D.C. Cir. 1979)). Moreover, it is well-settled in this Circuit that subsequent disclosure of documents initially withheld does not alone establish bad faith. *E.g.*, *Public Citizen* v. *Dep't of State*, 276 F.3d 634, 645 (D.C. Cir. 2002); *Gutman*, 238 F. Supp. 2d at 291.

Here, rightly or wrongly, the defendant narrowly construed the plaintiff's initial FOIA request. However, after the parties engaged in discussions and this suit was commenced, the defendant expanded its

search for responsive documents, searched in locations not previously searched and utilized different search terms which expanded the scope of the search. While it now seems obvious that the defendant's initial search was inadequate, and it is clear that the defendant could have been more diligent in its initial response to the plaintiff's FOIA request, this does not demonstrate bad faith. As the Eighth Circuit has noted, "[w]hile the discovery of additional documents is evidence that the search was not thorough, such discovery is not conclusive of agency bad faith. It may be indicative of administrative inefficiency, or it may, as in this case, indicate reluctant diligence by the agency under the goad of persistent litigation by a determined plaintiff." *Miller* v. *Dep't of State*, 779 F.2d 1378, 1386 (8th Cir. 1986) (internal citations omitted). Such is the case here. Although the agency was not initially diligent, that alone does not demonstrate bad faith, especially in light of the subsequent efforts to search for responsive records once the parties engaged in discussions about the specific type of documents the plaintiff was seeking.[5]

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[5] The plaintiff places great weight on *Am. Civil Liberties Union* v. *Dep't of Defense*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004) to demonstrate that the defendant has a complete indifference to the mandates of the FOIA. Pl.'s Mem. at 13-14. However, this case is completely inapposite. There, the Court noted that "with small exception, no documents [had] been produced by defendant; no documents [had] been identified; no exemptions [had] been claimed; and no objections [had] been stated." *Id.* at 502-03. As demonstrated by the facts in this case, thousands of documents have been identified and produced, exemptions have been claimed, and a *Vaughn* index has been

The plaintiff's second argument—that bad faith is evidenced because there are inconsistencies between released documents and documents that have been withheld—is also meritless. Pl.'s Mem. at 14. The plaintiff avers that some released documents are virtually identical in substance to other documents that have been withheld. For example, the plaintiff points to instances where documents containing the views of the general public or non-agency attorneys were released, but other documents containing the views of other non-agency attorneys were not released. *Id.* at 14-15. While conceding that the release of documents containing comments from some non-agency attorneys and the general public does not waive the agency's ability to withhold similar documents, the plaintiff opines that the agency must clearly detail why documents containing the comments of one set of attorneys can be released, but documents containing the comments from another set cannot. To support its position, the plaintiff relies on *Army Times Publishing Co.* v. *Dep't of the Air Force*, 998 F.2d 1067 (D.C. Cir. 1993). *Id.* at 16-17. This case simply does not support the plaintiff's contention.

In *Army Times*, the plaintiff sought to obtain certain information pursuant to the FOIA that had been acquired by the Air Force through telephone surveys conducted by non-agency pollsters hired by the agency to assess military personnel views on working conditions. *Id.* at 1068-69. The defendant had previously released some of the survey results through news releases. *Id.* at 1069. The defendant, in deny-

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provided. Thus, the plaintiff's reliance on *Am. Civil Liberties Union* is clearly misplaced.

ing the plaintiff's FOIA request, claimed that FOIA's Exemption 5 prohibited the release of the withheld information. *Id.* The district court granted summary judgment to the Air Force. However, on appeal, the District of Columbia Circuit reversed, concluding that because some information from the surveys had been voluntarily produced, the agency could not claim a blanket exemption under the FOIA. *Id.* at 1071. Thus, to withstand scrutiny, an agency must provide detailed affidavits and/or a *Vaughn* index indicating why the documents withheld warrant application of Exemption 5, including determinations on segregability. *Id.*

Here, to the extent the plaintiff claims that bad faith is shown by the defendant's failure to comply with the requirement of *Army Times*, this argument misses the mark. First, *Army Times* did not even discuss bad faith, and it is therefore unclear why the plaintiff has relied on it for its bad faith proposition. Rather, *Army Times* addressed the applicability of Exemption 5, and stands for the proposition that a blanket exemption can not be claimed when part of the requested information has already been released. And, the defendant has complied with the requirements of *Army Times*. It has provided affidavits and a *Vaughn* index detailing why particular documents were withheld, and has made segregability determinations. *See* Def.'s Opp'n, Ex. 2; Ex. 3; Ex. 4. It was the lack of such information that was fatal to the agency's non-production in *Army Times*.[6] Moreover,

[6] Although this Court will address Exemption 5 in more detail in a separate portion of this opinion, *see infra* Section III.C at 23-32, because the plaintiff relies on *Army Times* as support for its bad faith argument, it is appropriate to note that the defendant, by using detailed affi-

with *Army Times*, but failed to do so, such a finding would not demonstrate bad faith or incompetence.

The Court therefore rejects the plaintiff's contention that the defendant's response to the plaintiff's FOIA request has been infected with bad faith.

B. Exemption 3 of the FOIA

Exemption 3 of the FOIA exempts from disclosure any document that has been "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). As the District of Columbia Circuit has noted, "a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure. We must find a congressional purpose to exempt matters from disclosure in the actual words of the statute . . . [not] in an agency's interpretation of the statute." *Reporters Comm. for Freedom of the Press* v. *Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). Thus, "[t]he aim of Exemption 3 is to incorporate only those statutes where it is clear that the basic policy decision in favor of nondisclosure has been made by the Legislative rather than by the Executive Branch." *Long* v. *IRS*, 742 F.2d 1173, 1179 n.14 (9th Cir. 1984) (citing *Am. Jewish Congress* v. *Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978)).

Here, the defendant relies on 10 U.S.C. § 130c (2000) as the basis for withholding documents pursuant to Exemption 3. Def.'s Mem. at 10-13. Section 130c provides that certain national security officials,

in this case the Secretary of Defense, can withhold from public disclosure sensitive information of foreign governments. 10 U.S.C. §§ 130c(a), (h). The documents at issue here are correspondence between DoD officials and representatives of the British and Canadian governments. Def.'s Mem. at 10-13. Because the plaintiff concedes that this statute satisfies the requirements of Exemption 3, Pl.'s Mem. at 31-32, the only question remaining is whether the requirements for withholding the documents under § 130c have been satisfied.

Information eligible for exemption from disclosure under 10 U.S.C. § 130c is defined by the statute as follows:

> (b) Information eligible for exemption.—For the purposes of this section, information is sensitive information of a foreign government only if the national security official concerned makes each of the following determinations with respect to the information:
>
> > (1) That the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization.
> >
> > (2) That the foreign government or international organization is withholding the information from public disclosure (relying for that determination on the written representation of the foreign government or international organization to that effect).
> >
> > (3) That any of the following conditions are met:

> (A) The foreign government or international organization requests, in writing, that the information be withheld.
>
> (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.
>
> (C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection (f) as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

10 U.S.C. § 130c(b). The statute also contains provisions controlling the length of time documents may be withheld from public disclosure. 10 U.S.C. § 130c(d).

The plaintiff argues that the defendant has failed to comply with the requirements of § 130(b), and thus it cannot rely upon this statutory provision to withhold responsive documents. The plaintiff advances five arguments in support of its position. First, the plaintiff contends that Christine Ricci, the declarent espousing the applicability of § 130c(b), does not have the authority to do so because she is not a "national security official." Pl.'s Mem. at 34. Second, the plaintiff opines that the defendant cannot satisfy 10 U.S.C. § 130c(b)(1) as to any documents that were sent from DoD officials to officials of

either the British or Canadian governments because the documents are not "from" these foreign governments. Pl.'s Mem. at 33-34. Third, the plaintiff contends that the defendant has failed to satisfy § 130c(b)(2) because it asserts there is no written representation from a foreign government stating that the foreign government is withholding the information from the public. *Id.* at 34. Fourth, the plaintiff broadly avers that the defendant has not satisfied any of the requirements under 10 U.S.C. § 130c(b)(3). Pl.'s Mem. at 33-36. And finally, the plaintiff opines that the defendant has failed to properly specify a time when the documents should be released. *Id.* at 36. The defendant takes exception with all of these positions. Def.'s Opp'n at 11-14. The Court will address each of the parties' arguments in turn, and for the reasons set forth below concludes that the defendant has failed to completely satisfy the requirements of § 130c.

Initially, this Court must determine whether Ms. Ricci has the authority to determine whether documents can be withheld under § 130c. Pl.'s Mem. at 34. 10 U.S.C. § 130c(a) states that "[t]he national security official concerned ... may withhold from public disclosure ... sensitive information of foreign governments in accordance" with the several provisions of the statute. And § 130c(h)(1) defines "[t]he term national security official concerned" as the "Secretary of Defense," the "Secretary of Homeland Security," and the "Secretary of Energy." Ricci is therefore not a "national security official" under § 130c(h)(1) as she serves as a DoD Associate Deputy General Counsel (Legal Counsel) in the Office of the General Counsel. Ricci Decl. ¶ 1. Apparently recognizing that Ricci does not qualify as a national security official, the de-

fendant argues that she has the authority to withhold documents under § 130c pursuant to her authority as an Initial Denial Authority when responding to FOIA requests. Def.'s Opp'n at 11.

Thus, according to the defendant, since § 130c can form the basis for withholding documents under Exemption 3, and Ms. Ricci has the authority to withhold documents under the FOIA, she "in essence" has the authority to withhold documents under § 130c. *Id.* (citing Pl.'s Opp'n, Ex. 4 ¶ 6). This reasoning simply misses the mark.

10 U.S.C. § 130c(h) clearly provides, at least in the context of this case, that only the Secretary of Defense may designate documents to be withheld under § 130c. The statute provides for no other person in the DoD to make such a determination, nor does it incorporate any language to suggest that an individual with authority to withhold documents under the FOIA can also withhold documents under § 130. This Court cannot read into a statute language that is clearly not there. *Qi-Zhuo* v. *Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995) ("Where, as here, the plain language of the statute is clear, the court generally will not inquire further into its meaning."). Moreover, while this Court can look beyond the plain language of a statute if applying the plain language would lead to an absurd result, *Perry* v. *Commerce Loan Co.*, 383 U.S. 392, 400 (1966), the defendant makes no such argument here, nor could it for the following reasons. It is clearly not unreasonable for the Secretary to be exclusively charged on behalf of the DoD with making a determination of whether documents containing sensitive information from foreign governments should be withheld from public disclosure. Moreover, even if 10 U.S.C. § 130c(g),

which provides that the Secretary "shall . . . prescribe regulations to carry out this section," authorizes the Secretary to delegate his authority for designating documents for non-production under § 130c (a question the Court need not answer in this case), the defendant has not directed this Court to any regulation where such a designation has been made, nor could this Court find any. Rather, the defendant asks this Court to infer that § 130c authority has been delegated by the Secretary to Ms. Ricci because she "is an 'official who has been granted authority by the head of a DoD component to withhold records requested under the FOIA ... '" Def.'s Opp'n at 11.[7] This Court simply cannot make that leap to permit the Secretary to avoid the authority vested in him by statute, or to at least promulgate regulations for the delegation of that authority, which would trigger the notice and comment requirements that would likely accompany any rulemaking under § 130c(g). *See, e.g.*, 5 U.S.C. § 553 (discussing the notice and com-

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[7] Even if the Court could accept the defendant's position, which it cannot, the defendant's argument would still fail. Section 130c makes clear that the power for withholding documents lies with the Secretary of Defense, thus only the Secretary of Defense can delegate those powers, assuming that delegation is permitted. Ricci's powers under the FOIA, however, have been given to her by the head of a Department of Defense Component. Def.'s Opp'n, Ex. 5 at 14. The Secretary is not a Department of Defense Component, and thus, Ricci's authority to address FOIA requests is of no moment. In any event, assuming the Secretary can delegate his authority under § 130c, it is clear that such delegation could only be effected pursuant to regulations adopted by the Secretary. *See* 10 U.S.C. § 130c(g)(1).

ment process). Accordingly, it is clear that the defendant has failed to comply with the requirements of 10 U.S.C. § 130c. Nonetheless, this Court will examine the parties' remaining arguments in assessing how to resolve the parties' summary judgment motions.[8]

The Court turns now to the plaintiff's remaining arguments. 10 U.S.C. § 130c(b)(1) requires the withholding of documents if "the information was provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization." 10 U.S.C. § 130c(b)(1). The plaintiff contends that documents 2, 78, 81, and 85 cannot be withheld under this provision because the documents were sent from DoD officials to the foreign governments, rather than having been received from those foreign governments. Pl.'s Mem. at 34. Specifically, documents 2, 81, and 85 are correspondence (or draft correspondence) from the General Counsel of the DoD to the Attorney General of the United Kingdom. Def.'s Mem., Ex. 11 (*Vaughn* Index) at 2, 57-58, 62-63. Each of these correspondences responded to specific issues raised by the Attorney General of the United Kingdom regarding the military commission proceedings. *Id.* And document

[8] As this Court concludes below, the defendant has satisfied the other requirements for withholding documents pursuant to 10 U.S.C. § 130c. Accordingly, this Court will not require that the defendant, at this time, release the documents solely because they have failed to properly designate the documents as protected by 10 U.S.C. § 130c. Rather, this Court will afford the defendant an opportunity to cure the defect discussed herein. Failure to do so, however, will result in this Court ordering the documents released.

78 is a correspondence from the General Counsel of the DoD to the British Ambassador to the United States which responded to concerns from the United Kingdom regarding the military commissions. *Id.* at 53-54. The plaintiff asks this Court to read § 130c(b)(1) narrowly so as to exempt from disclosure only correspondence from foreign governments to the United States. Pl.'s Mem. at 34. Thus, the plaintiff opines that since these correspondences emanate from the United States, they are not protected by 10 U.S.C. § 130c(b)(1). *Id.* This Court cannot accept the plaintiff's reading of the statute.

It is important to note at the outset that there is a dearth of case law construing § 130c in the FOIA context. In fact, the parties are only able to provide this Court with two cases in which courts have considered whether § 130c could be invoked to withhold documents under Exemption 3 of the FOIA, Def.'s Opp'n at 13-14, and this Court can find no others. These cases, although not binding on this Court, are persuasive. In fact, in *ACLU* v. *Dep't of Defense*, No. 04-CV-4151 (S.D.N.Y. 2004), a member of the District Court for the Southern District of New York rejected a similar argument that 10 U.S.C. § 130c(b)(1) should be read narrowly. Def.'s Opp'n, Ex. 7. In that case, the District Court was presented with the question of whether communications from the DoD to the International Committee of the Red Cross ("Red Cross") were properly withheld pursuant to 10 U.S.C. § 130c. *Id.* at 7-8. Those communications expressed concerns raised by the Red Cross about the treatment of detainees at Guantanamo Bay, Cuba. *Id.* In concluding that § 130c protected those documents from disclosure, the Court found that "if the [Red Cross] has made a point [,] and the government

in considering the point and in responding to the point expresses itself in a way that would allow the reader to see the point communicated by the [Red Cross], I would think the . . . privilege would apply." *Id.* at 8. The conclusion is consistent with the plain language of the statute which prohibits the disclosure of "*information* . . . provided by, otherwise made available by, *or produced in cooperation with*, a foreign government or international organization." 10 U.S.C. § 130c(b)(1) (emphasis added). The statute therefore protects certain information produced by the United States so long as it was created in cooperation with a foreign government or an international organization. Thus, the origin of a document is not determinative. Indeed, it would be absurd to conclude that the government may only withhold information relayed from the foreign government, but not a document produced by the United States in cooperation with the foreign government even though the United States's generated documents make clear the substance of the information provided by the foreign government.

In this case, the *Vaughn* index states that all four challenged documents are responses to issues raised by officials of the United Kingdom. By responding to this request for sensitive information, these documents themselves fall under the ambit of 10 U.S.C. § 130c, as a reader would undoubtedly be made aware of the issues raised by the United Kingdom upon reading them. Thus, so long as the information contained in the letters satisfies the other requirements of § 130c(b), the correspondence clearly relate to information that is protected by the statute and can properly be withheld.

The plaintiffs third contention is also without merit. 10 U.S.C. § 130c(b)(2) requires that the foreign government indicate *in writing* that they are withholding from public disclosure the information provided to the United States. The plaintiff contends that the Ricci declaration is devoid of any reference to a written representation from a foreign government stating that it is withholding from public disclosure the information which is the subject of its inquiry. Pl.'s Mem. at 34. In fact, the plaintiff contends that the British government has disclosed much of the information it is requesting. *Id.* This Court agrees that the Ricci declaration does not allege the existence of a written statement of nondisclosure from a foreign government. Ricci Decl. ¶ 19. However, the defendant, no doubt appreciating its failure to comply with this requirement, clarified in a later declaration submitted by Ms. Heckler that it "h[as] since received written communications from the foreign governments regarding this matter. These communications make clear that the foreign governments are withholding this information from public disclosure and that they are asking the Department of Defense also to not release the information to the public." Pl.'s Reply, Ex. 4 ¶ 7. It is apparent that when Ricci submitted her declaration that the foreign governments had made no written representation indicating its desire that the requested information not be released to the public. Thus, any attempt to withhold disclosure under § 130c based on Ms. Ricci's declaration surely would have failed. It is curious then why the defendant would even attempt to assert § 130c based on what Ricci said. However, the defendant now claims that the foreign governments have made such representations, albeit in the

final stages of the briefing of the parties' dispositive motions. This Court has no reason to doubt the veracity of this new declaration, and for the purpose of addressing the current motions will rely upon the representations made by Ms. Heckler. *Public Citizen*, 276 F.3d at 645. However, if the defendant again reasserts Exemption 3 and § 130c, the Court will require that the defendant submit copies of these written representations.[9]

The plaintiff also posits that 10 U.S.C. § 130c(b)(2) cannot be invoked because the foreign governments themselves have made clear their positions regarding military commissions. Pl.'s Mem. at 29-30, 34. Admittedly, the foreign governments have expressed, in a general sense, their positions on the

[9] This Court is troubled by the defendant's initial reliance on 10 U.S.C. § 130c, as the Hecker declaration makes clear that the requirements of § 130c(b)(2) were not complied with at the time the documents were withheld and at the time summary judgment briefing commenced in this action. While the Court has no reason to believe that the defendant, through the Ricci Declaration, attempted to deceive either the Court or the plaintiff, it is clear it had no legal basis for its position based on her declaration. Nevertheless, the defendant has now satisfied all but one of the requirements of 10 U.S.C. § 130c. And because this Court is permitting the defendant to correct the failure to have the proper person designate documents that are being withheld under § 130c, the Court will also require the defendant to submit to the Court copies of the written representations from the foreign governments. If, for some reason, the defendant believes these communications also cannot be made public, the Court will consider permitting the defendant, upon motion, to submit them *ex parte* for the Court's *in camera* inspection.

military commissions. *Id.* at 30. However, these general expressions do not establish that the discrete information provided in the correspondence the plaintiff seeks to acquire have been released to the public by the foreign governments. Moreover, the defendant has submitted affidavits indicating that the foreign governments have not released the information to the public. There is simply no "authority for the proposition that the Secretary of Defense must look behind" the written statements for nondisclosure provided by a foreign government to determine whether the foreign government desires to withhold the information from the public. *Gerstein* v. *Dep't of Defense*, No. 03-5193, slip-op. at 7-8 (N.D. Ca. Dec. 21, 2004). Rather, the Secretary can rely on the written representations made by the foreign governments and need not engage in an exhaustive review to determine their veracity. But in any event, here, the public expressions of general views about military commissions by the foreign countries does not encompass the more detailed views on the subject that have not been publicly disclosed.

The plaintiff next argues that the defendant failed to comply with 10 U.S.C. § 130c(b)(3). Pl.'s Mem. at 34-36. This argument is also without merit. Under § 130c(b)(3), the defendant must satisfy at least one of three following requirements:

> (A) The foreign government or international organization requests, in writing, that the information be withheld.
>
> (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.

> (C) The information is an item of information, or is in a category of information, that the national security official concerned has specified in regulations prescribed under subsection (f) as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future.

10 U.S.C. § 130c(b)(3). Based on the declarations submitted to this Court, it is clear that the defendant has complied with § 130(b)(3)(A) and (B). As previously discussed, following the commencement of this litigation, the foreign governments submitted, in writing, their position that the information at issue here was provided to the United States on the condition that it be kept secret from the public. Def.'s Opp'n, Ex. 4 ¶ 7. Moreover, earlier declarations make clear that the information contained in the documents was "provided in confidence on the condition that they not be released to the public." Ricci Decl. ¶ 19. It is well-settled in this Circuit that this Court may properly rely upon the declaration submitted by the parties in support of their summary judgment motions. *Public Citizen*, 276 F.3d at 645. Here, this Court can see no reason why these declarations are not sufficient, as they are not conclusory or contradicted by other evidence. Accordingly, the challenged documents have satisfied the requirements of 10 U.S.C. § 130c(b)(3).

Finally, the plaintiff alleges that the defendant has failed to comply with 10 U.S.C. § 130c(d)(3), because no date certain for the release of the information was designated. Pl.'s Mem. at 36 n.28; Pl.'s Reply at 15-16. The plaintiff's argument has no merit.

The plaintiff claims that the national security official who invoked § 130c was required to set a date when the information contained in the withheld documents can be released because the foreign governments did not identify a specific date. Pl.'s Reply at 15. However, the plaintiff misconstrues the circumstances under which § 130c(d)(3) is applicable.

10 U.S.C. § 130c(d) sets forth a formula for determining if, and when, documents protected from disclosure should released to the public. The plaintiff concedes that the information at issue here came into the possession of the United States after the enactment of Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. Pl.'s Mem. at 33. Thus, the release of this information is controlled by 10 U.S.C. § 130c(d)(2). Under this provision, information can be withheld only until the date specified by the foreign government. *Id.* § 130c(d)(2)(B). Here, however, the foreign governments have failed to specify a date for the release of the information. Thus, the plaintiff opines that 10 U.S.C. § 130c(d)(3) applies, and the national security official was required to select a date for the release of the information after considering the requests of the foreign government who provided the information. 10 U.S.C. § 130c(d)(3). While the plaintiff is correct in its reading of the statute, it completely ignores another provision of the statute. Under § 130c(d)(2)(C), § 130c(d)(3) applies only if the information requested "came into possession or under the control of the United States more than ten years before the date on which the request is received by an agency." Thus, unless the information came into the possession of the United States more than ten years before the request for disclosure was made, the Court

need not engage in the analysis called for in § 130c(d)(3). Rather, this determination need only be made if the national security official receives a request for documents that have been under the possession and control of the United States for ten or more years. Accordingly, the statute presumes in the situation here that there will be nondisclosure for at least ten years from the time the requested information "came into the possession or control of the United States." 10 U.S.C. § 130c(d)(2)(C). With the plaintiff conceding that the information came into the possession of the United States after 2001, it is clear, contrary to the plaintiff's suggestion, that the national security official is not yet required to designate a date certain for the release of the information. Rather, such a designation need only be made if a request for the documents is received after the United States has been in possession of the documents for more than ten years, and after the government confers with the foreign governments. *See* 10 U.S.C. § 130c(d). Here, the documents in question were received by the United States between June and October 2003. Def.'s Mem., Ex. 11 at 2, 53, 57, 62. Thus, the agency does not need to designate a specific date for the release of the documents until a request for the documents is received after the United States has been in possession of the documents for more than ten years, which would be in October 2013.

Based on the foregoing discussion, it would seem that the documents withheld by the defendant likely qualify for protection under 10 U.S.C. § 130c. However, the defendant has failed to properly invoke this statutory provision because the Secretary, pursuant

to his duty under the statute, has not designated the documents as eligible for exemption under § 130c.

C. Exemption 5 of the FOIA

Exemption 5 of the FOIA's disclosure requirements protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "In other words, Exemption 5 incorporates 'all civil discovery rules'" into the exemption. *Defenders of Wildlife* v. *Dep't of Agriculture*, 311 F. Supp. 2d 44, 57 (D.D.C. 2004) (quoting *Martin* v. *Office of Special Counsel*, 819 F.2d 1181, 1185 (D.C. Cir. 1987)). Thus, courts have incorporated the following three traditional civil discovery privileges under Exemption 5: (1) the deliberative process privilege; (2) the attorney-client privilege; and (3) the attorney work-product privilege. *Id.*, *see also Nat'l Labor Relations Bd.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Coastal States Gas Corp.* v. *Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980). However, "Congress intended to confine exemption (b)(5) 'as narrowly as is consistent with efficient Government operation.'" *Puerto Rico*, 823 F.2d at 584 (quoting *Coastal States*, 617 F.2d at 868). Any challenge to nondisclosure under Exemption 5 first requires the Court to determine whether the withheld documents qualify as "intra-agency" or "inter-agency" documents and second to assess whether one of the three enumerated privileges applies. Here, the plaintiff raises a number of challenges to the defendant's assertion of the exemption, and the Court will now address each prong of the test in turn.[10]

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[10] Any legal analysis under Exemption 5 of the FOIA requires the Court to first determine whether there are "in-

1. Are Comments from Non-Agency Lawyers Protected from Disclosure as "Intra-Agency" or "Inter-Agency" Documents?

Fundamental to the assertion of Exemption 5 is the requirement that the documents being withheld qualify as either "inter-agency" or "intra-agency" documents. The defendant claims that it properly withheld the documents here pursuant to the deliberative process privilege of Exemption 5 because they reflect the views and opinion of "DoD officials, attorneys, and consultants" in connection with the promulgation of regulations detailing the process for conducting military commissions, and thus qualify as either intra-agency or inter-agency documents. Def.'s Mem. at 17. The plaintiff, however, argues that the private attorneys who provided comments to the DoD are not agency personnel or consultants, but rather are simply private citizens voicing their opinions.

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tra-agency" or "inter-agency" documents at issue. If the Court answers this question in the affirmative, the next question to decide is whether one of the three recognized privileges applies, *i.e.*, whether the deliberative process privilege prohibits disclosure of the documents. This second analysis requires the Court to examine, for example, whether the documents are predecisional and deliberative. In this case, both parties appear to have conflated this two level analysis into a single determination. However, the vast majority of the plaintiff's arguments relate to the first question—whether the documents are intra-agency or inter-agency. In fact, it appears that the only argument raised by the plaintiff that the documents are not entitled to the deliberative process privilege is that there is no evidence that open and frank communications will be affected by the disclosure of the information. Pl.'s Mem. at 24.

Pl.'s Mem. at 19-20. Thus, the plaintiff opines that documents containing the views of these private attorneys cannot be withheld under Exemption 5. *Id.* Specifically, the plaintiff argues that the views of private citizens are not protected from disclosure unless the agency can properly invoke the "consultant corollary exception," which treats the views expressed by individuals outside the agency the same as agency personnel. Pl.'s Reply at 1. Here, the plaintiff claims that this exemption does not apply because: (1) the attorneys "volunteered" their time and did not function as agency personnel; (2) they did not possess expertise that was unavailable within the government; (3) their views were simply comments on a rulemaking process; (4) there is no reasonable basis to believe that disclosure of these documents would inhibit frank and honest communication; (5) there is no evidence that their comments were provided in confidence; and (6) the DoD has released comments from other outsiders who are in virtually the same position as those individuals whose comments were withheld.[11] *Id.* at 2. The defendant, however, argues that the documents containing the views of the non-agency attorneys are properly treated as intra-agency or inter-agency documents. This Court agrees.

The Supreme Court has made clear that Exemption 5 protects not only inter-agency and intra-

[11] Despite the plaintiff's assertion that all of these arguments relate to whether the documents of these attorneys are properly classified as intra-agency documents, Pl.'s Reply at 2, some, in fact, are more appropriately addressed in the following section concerning the deliberative process privilege and accordingly will be addressed there.

agency communications among employees, but also communications from outside consultants or other individuals hired or solicited by an agency for their views. *See Dep't of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10-11 (2001). For example, in *Public Citizen, Inc.* v. *Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the District of Columbia Circuit held that communications between former Presidents of the United States and the National Archives and Records Administration concerning the maintenance of their presidential records were protected from disclosure under the deliberative-process privilege under Exemption 5, even though the former Presidents had "independent presidential interests" in the disposition of their documents by the agency. 111 F.3d at 171. Moreover, in *Ryan* v. *Dep't of Justice*, 617 F.2d 781 (D.C. Cir. 1980), the Circuit Court held that Senators' responses to a questionnaire from the Attorney General about judicial nominations were exempt from disclosure even though the Senators likely had strong personal views on the matter. 617 F.2d at 790 ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency memorandum"); *see also Formaldehyde Institute* v. *Dep't of Health and Human Services*, 889 F.2d 1118, 1122 (D.C. Cir. 1989) (quoting *Ryan*, 617 F.2d at 789-90); *Wu* v. *Nat'l Endowment for Humanities*, 460 F.2d 1030, 1032 (5th Cir. 1972); *Larder* v. *Dep't of Justice*, 2005 WL 758267, at *15 (D.D.C. March 31, 2005) (following the holdings in *Ryan* and *Klamath*).

While a consultant need not "be devoid of a definite point of view when the agency contracts for its services," *Klamath*, 532 U.S. at 10, for his views to be covered by Exemption 5, the consultant should not be representing an interest of his own, or that of any client, when he or she is advising the agency, *Id.* at 10-11. Thus, as the *Klamath* Court noted, when a consultant has no interest to advance, his only obligation is "to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do." *Id.* at 11. In *Klamath*, the agency was communicating with Indian tribes who clearly had their own interests in mind, and thus were self-advocates at the expense of others. *Id.* at 12; *see also Larder*, 2005 WL 758267, at *14-15. Accordingly, documents containing their positions were not intra-agency records under Exemption 5. *Id.* The holdings in *Public Citizen* and *Ryan* are arguably a more expansive view of the Exemption 5 privilege than that discussed in *Klamath*, because the Senators in *Ryan* and the former Presidents in *Public Citizen* were advocating positions which would likely benefit themselves. Nevertheless, the Supreme Court explicitly declined to overrule these rulings of the District of Columbia Circuit, *Klamath*, 532 U.S. at 12 n.4 (citing *Public Citizen*, 111 F.3d at 168; *Ryan*, 617 F.2d at 781), and they remain good law and therefore binding on this Court.

The documents requested here fall squarely within the scope of these cases and the reasoning in *Klamath*. The information that came from the non-agency attorneys consisted of memoranda, correspondence, emails, and draft documents, all relating to the adoption of the regulations establishing the

military commissions. *See, e.g.*, Def's Mem., Ex. 11 at 3-4, 11-12, 13-24. Moreover, the views of these non-agency attorneys were requested by the DoD.[12] There is simply no evidence that any non-agency attorneys were representing their personal interests or the interests of any clients in making their comments. Rather, the comments were clearly made to advance the "truth and [the consultant's] sense of what good judgment calls for, and in those respects [the consultant] functions just as an employee would be expected to do." *Klamath*, 532 U.S. at 11.

The plaintiff's attempt to distinguish the case at hand from the controlling precedent in this Circuit and persuasive case law from other Circuits is simply unavailing. First, *Wu* and *Formaldehyde* make clear that documents need not be produced by government employees to be considered "intra-agency" documents. *Formaldehyde Inst.*, 889 F.2d at 1120

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[12] To the extent that the plaintiff argues that the non-agency attorneys simply "volunteered" their time and were not paid, nor even requested to share their views, Pl.'s Mem. at 20, the plaintiff's position still fails for several reasons. First, the Fifth Circuit, in *Wu* did not limit outside consultants only to those who are paid or provide extensive service to an agency. *Wu*, 460 F.2d at 1031 (volunteer outside reviewers for a single project). And second, the Secretary of Defense's statement that these attorneys volunteered their time, does not mean that their comments were unsolicited. Rather, reading the transcript from the entire press conference cited by the plaintiff demonstrates that these attorneys were solicited for advice, and voluntarily provided it. Pl.'s Mem., Ex. A at 9 ("We reached out not just to those people identified, [*i.e.*, non-agency attorneys,] but also experts within the building.").

(outside experts in Chinese studies); *Wu*, 460 F.2d at 1031 (outside reviews for journal article). Moreover, contrary to the plaintiff's suggestion, there is simply no requirement under the case law that the outside consultants possess expertise not possessed by those inside the agency. As the Supreme Court has noted, the objective of the deliberative process privilege under Exemption 5 "is to enhance 'the quality of agency decisions.'" *Klamath*, 532 U.S. at 9 (citing *Sears, Roebuck & Co.*, 421 U.S. at 151.) Clearly, the views of non-agency practicing attorneys either challenging or confirming the views of DoD's internal attorneys and other personnel on a subject of vital importance to this nation would enhance the quality of the agency's decision making process and is consistent with the objectives of Exemption 5. Accordingly, documents containing the views of these non-agency attorneys qualify as intra-agency documents.[13]

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[13] The plaintiff makes additional arguments, none of which warrant much discussion. First, the plaintiff opines that the defendant's conclusory statement that the non-agency attorneys were informed that their views would be confidential is insufficient to establish that FOIA Exemption 5 applies. Pl.'s Mem. at 25. However, despite a lengthy discussion in its papers, the plaintiff cites absolutely no legal authority for the proposition that the defendant must establish that the views of the non-agency attorneys were furnished in confidence to be considered intra-agency documents under Exemption 5. It appears that the basis for the plaintiff's contention is that these non-agency attorneys are merely private parties sharing their views with the agency. Nonetheless, as already discussed, these non-agency attorneys were acting as consultants, and thus qualified as quasi-employees of the agency. Accordingly, in order to encourage frank and

2. The Deliberative Process Privilege

The defendant relies on the deliberative process privilege of Exemption 5 as the basis for withholding the majority of the documents requested by the plaintiff. Def.'s Mem. at 13. The deliberative process privilege protects from disclosure "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Klamath*, 532 U.S. at 8 (quoting *Sears*, 421 U.S. at 150) (internal quotation marks omitted). The purpose of the deliberative process privilege is to ensure open communication between subordinates and superiors, to prevent premature disclosure of policies before final adoption, and to avoid public confusion if grounds for policies that were not part of the final adopted agency policy happened to be exposed to the public. *Defenders of Wildlife* v. *Dep't of Agric.*, 311 F. Supp. 2d 44, 57 (D.D.C. 2004); *Coastal States*, 617 F.2d at 866. Thus, when a court reviews whether an agency properly withheld documents under the deliberative process privilege, the critical question that must be answered is whether "disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discus-

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open discussion, the documents containing the views of these non-agency attorneys are confidential intra-agency records under the deliberative process privilege. In addition, the plaintiff, relying on *Army Times*, opines that the withheld documents are not intra-agency documents because some documents containing the views of other non-agency attorneys were released. As already discussed, however, *Army Times* provides no assistance to the plaintiff. *See supra* Section III.A at 10-11.

sion within the agency and thereby undermine the agency's ability to perform its functions." *Formaldehyde*, 889 F.2d at 1122 (quoting *Dudman Commc'ns Corp.* v. *Dep't of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)); *see also Sears*, 421 U.S. at 151 (noting that the main purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions"). By its own terms, Exemption 5 only applies to "inter-agency" or "intra-agency" records.

For materials to be exempt from disclosure under the deliberative process privilege, the agency must show that its decision is both (1) predecisional and (2) deliberative. *Nat'l Ass'n of Home Builders* v. *Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002). "A document is predecisional if it was 'prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." *Petroleum Info. Corp.*, 976 F.2d at 1434 (quoting *Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975)). Accordingly, the decision must be "[a]ntecedent to the adoption of agency policy." *Jordan* v. *Dep't of Justice*, 591 F.2d 753, 774 (1978). However, a document cannot be properly characterized as predecisional "if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public." *Coastal States*, 617 F.2d at 866. Examples of the type of documents that might qualify as predecisional are "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.*

A document is deliberative if the "materials ... bear on the formulation or exercise of agency policy-oriented *judgment*." *Petroleum Info. Corp.*, 976 F.2d

at 1435 (emphasis in original). The information must be "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn*, 523 F.2d at 1144. Most importantly, the document must reflect the "give-and-take of the consultative process." *Puerto Rico*, 823 F.2d at 585. In determining whether the deliberative process privilege should apply to a particular document, courts often look at "the nature of the decision making authority vested in the officer or person issuing the disputed document, and the relative positions in the agency's chain of command occupied by the document's author and recipient." *Animal Legal Defense Fund, Inc.* v. *Dep't of the Air Force*, 44 F. Supp. 2d 295, 301 (D.D.C. 1999) (citations and internal quotation marks omitted). Although there are many cases in this Circuit which discuss the deliberative process privilege, these cases "are of limited help . . . because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process." *Coastal States*, 617 F.2d at 867. As discussed above, and repeatedly emphasized by the District of Columbia Circuit, "'conclusory assertions of privilege will not suffice to carry' the agency's burden" of establishing its right to withhold records. *Puerto Rico*, 823 F.2d at 585 (quoting *Coastal States*, 617 F.2d at 861).

The plaintiff puts forth two arguments in support of its position that the deliberative process privilege is not applicable in this case. Although the plaintiff does not contend that the documents at issue are not predecisional, it does opine that the documents are not part of the agency's deliberative process because (1) they are merely comments about

a proposed rulemaking, Pl.'s Mem. at 18, and (2) there is no evidence that open and frank communications will be affected by the disclosure of the documents. Pl.'s Mem. at 24. Neither argument has merit for the following reasons.

Although the plaintiff insists that exempting the views of non-agency attorneys from disclosure pursuant to Exemption 5 "would create a dangerous exception to the notice and comment process" by creating a secret system for commenting on proposed rules, *id.* at 25, it concedes that this case does not involve an Administrative Procedure Act ("APA") rulemaking, 5 U.S.C. §§ 533, 706 (2000), Pl.'s Mem. at 25. Thus, there is no conflict between the APA's notice and comment requirements and the objectives underlying Exemption 5 as suggested by the plaintiff. In fact, "military or foreign affairs function[s] of the United States" are exempt from notice and comment rulemaking. 5 U.S.C. § 533(a). In the alternative, the plaintiff opines that disclosure of the non-agency attorneys' comments would not stifle honest and frank communication with the agency, and thus they do not warrant protection under the deliberative process privilege. Pl.'s Mem. at 24. Specifically, the plaintiff contends that "comments from attorneys of the caliber and stature" of those that provided comments would not inhibit similarity situated outsiders from expressing their views, especially since some of the comments of others were not protected from release. This argument is also baseless. As already discussed, documents are deliberative if they are drafts or recommendations which reflect the personal view of the author, which clearly the documents in question here are. *See Coastal States*, 617 F.2d at 867. Moreover, contrary to the plaintiff's

view, disclosure of these documents might very well stifle the frank and honest views of others who may in the future be asked to provide advice and guidance to the DoD. And the stature of an outside consultant is simply irrelevant to this discussion.

In sum, the documents which contain the views of the non-agency attorneys qualify as intra-agency documents and are thus protected from disclosure by Exemption 5.

D. Segregability of the Requested Information

Under the FOIA, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). However, "[i]t has long been the rule in this Circuit that non-exempt portions of a document must be disclosed *unless* they are inextricably intertwined with exempt portions." *Mead Data Cent., Inc.* v. *Dep't of Air Force*, 566 F.2d 242, 260 (1977) (emphasis added). In ascertaining whether otherwise disclosable information is inextricably intertwined with exempt information, it is the agency that has "the burden of demonstrating that [the] withheld documents contain no reasonably segregable factual information." *Mokhiber* v. *Dep't of the Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004).

Here, the plaintiff alleges that a number of documents contain factual information that should have been disclosed, but were not, and thus the defendant has failed to properly segregate the requested information in violation of the FOIA. Pl.'s Mem. at 27-29. Namely, the plaintiff contends (1) that document 74, by its very description in the *Vaughn* index, contains factual information which is

segregrable from the exempt deliberative process information, and (2) that fourteen documents appear to set forth the views of some or all of the various outside consultants, and since the views of the outside consultants are not properly withheld under the deliberative process privilege, it is factual information that should be disclosed. Pl.'s Mem. at 27-29. However, with respect to the plaintiffs's second position, this Court has already held that the views of the non-agency attorneys were properly withheld under the deliberative process privilege. *See supra* Section III.C at 23-32. Thus, because the plaintiff's underlying argument has been rejected, so too must its position on segregability. Pl.'s Reply at 19 n.11. Moreover, the plaintiff's first segregability argument is also without merit. The adequacy of the *Vaughn* index in regards to the segregability question turns on whether the agency has sufficiently explained why there was no reasonable means of segregating factual material from the claimed privileged material. "[A]gencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts." *Mead Data*, 566 F.2d at 261. For example, factual material which does not bear on policy determinations must be segregated and produced in response to a plaintiff's FOIA requests. 5 U.S.C. § 522(b); *see Judicial Watch, Inc.* v. *Dep't of Justice*, 337 F. Supp. 2d 183, 186 (D.D.C. 2004). Furthermore, the agency must evaluate each document to determine if segregable material can be provided to the requestor. *Kimberlin* v. *Dep't of Justice*, 139 F.3d 944, 950 (D.C. Cir. 1998) ("[n]either the [plaintiff] nor the court ... is obliged to accept the conclusion without more specification of the types of material in

the file."); *Krikorian* v. *Dep't of State*, 984 F.2d 461, 466-67 (D.C. Cir. 1993). Moreover, "the withholding agency must supply 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *King*, 830 F.2d at 224 (quoting *Mead Data*, 566 F.2d at 251). The *Vaughn* index provided by the agency should therefore "specify in detail which portions of the document are disclosable and which are allegedly exempt." *Vaughn*, 484 F.2d at 827.

Here, the defendant has provided detailed representations with respect to whether the information contained in document 74 is reasonably segregrable. *See* Def.'s Reply at 16, Attach. 4 ¶ 9.b. Specifically, the defendant indicates that document 74 "includes discussions on proposed commission procedures, prosecution strategy, and legal opinions ... ." *Id.* Admittedly, this declaration was submitted late in the game, and ideally determinations of nonsegregability should have been made by the defendant for each document in the *Vaughn* index when it was initially submitted to the Court. Nonetheless, the Court has now been supplied with a nonconclusory declaration that addresses the matter, and there is no indication that it has been submitted in bad faith. Accordingly, the defendant has satisfied its obligation under the FOIA to demonstrate nonsegregability. *Public Citizen*, 276 F.3d at 645. As stated earlier, *see supra* Section III.C.2 at 28-32, the information contained in document 74 implicates the protections afforded by Exemption 5's deliberative process privilege. Accordingly, this Court finds no merit to the plaintiff's nonsegregability challenge.

E. Adequacy of the Search

The plaintiffs final argument is that the defendant's search was inadequate. Pl.'s Mem. at 37-38. Specifically, the plaintiff notes that the DoD "has neither released nor identified a single document relating to the development of the President's November 13, 2001 Military Order. All of the released and identified documents concern [the DoD's] implementing orders and instructions." *Id.* at 37. In addition, the plaintiff indicates that documents that have been released refer specifically to other documents that have neither been released nor accounted for in the defendant's *Vaughn* index. *Id.* at 37-38. It is therefore the plaintiff's position that the defendant's search has been inadequate. The defendant, on the other hand, takes exception with the plaintiff's position. The Court previously addressed the legal standard and related arguments earlier in its discussion concerning the plaintiffs allegations of bad faith. *See supra* Section III.A at 7-8. Accordingly, only those matters not previously discussed will be addressed here. For the following reasons, the Court agrees that the search was adequate.

As support for its position, the defendant relies on the declarations of Christine Ricci, Stewart Aly, Karen Heckler, and Lawrence Horner. Their declarations reveal that once the DoD received the plaintiff's FOIA request, it was referred to two offices within the Office of the Secretary of Defense—the Correspondence and Directives Division and the Office of the General Counsel. Ricci Decl. ¶ 4. The search of these offices produced numerous documents. *Id.* ¶¶ 5, 7. Following the parties' submission of their initial summary judgment motions, the

defendant conducted a subsequent search in a number of offices, including the Office of Legal Counsel; the correspondence files of the General Counsel; and the files of the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, the Office of Detainee Affairs, and the Public Inquiries & Analysis Office within the Public Affairs Office. *Id.* ¶ 9. In addition, former employees were asked where responsive documents might be located. *Id.* This new search also applied different search criteria and resulted in thousands of additional documents being discovered. *Id.* The declarations submitted to the Court are detailed, "setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials ... were searched." *Valencia-Lucena*, 180 F.3d at 326. From these declarations, it is clear that the defendant's search was reasonably designed to discover all responsive documents.

The plaintiff argues otherwise, and contends that a reasonable search should have discovered more records. For example, the plaintiff notes that not "a single document relating to the development of the President's November 13, 2001 Military Order" was discovered. Pl.'s Mem. at 37. Moreover, the plaintiff suggests that the some of the released documents indicate the existence of other documents that were neither released nor listed in the *Vaughn* index. Pl.'s Mem. at 37-38. For example, the plaintiff seeks copies of "a draft military commission instruction entitled 'Review of Trials by Military Commissions,'" which was referenced in a number of other released documents, but was not produced or listed in the *Vaughn* index. *Id.* In addition, the plaintiff challenges the fact that there were no meeting minutes

listed in the *Vaughn* index for a meeting allegedly held between non-agency attorneys and Paul Wolfowitz, the Deputy Secretary of Defense at that time, which was referenced in another released document. *Id.* at 38. These arguments have no merit. As the Circuit Court has noted, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry*, 684 F.2d at 128. The Court, having already concluded that the search was adequate, must also conclude that the plaintiff's argument that more documents should have been found is of no moment. Moreover, the plaintiff has failed to provide this Court with any indication that other offices should have been searched, or that other search terms should have been used. Rather, it simply asserts that the search was inadequate because an insufficient number of documents were discovered. This conclusory assertion is inadequate to rebut the detailed declarations submitted by the defendant.[14]

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[14] In the plaintiff's reply brief, it questions for the first time whether the database of incoming and outgoing official correspondence from the Secretary and Deputy Secretary of Defense were searched with appropriate key words following the expansion of the defendant's initial search for responsive documents. Pl.'s Mem. at 19. Moreover, the plaintiff suggests that the defendant is required to explicitly describe what documents are contained in that database, and that responsive documents therein were included in the *Vaughn* index. *Id.* This argument has no merit. The database was searched with very broad terms including the terms "military commission" and "military orders," Pl.'s Opp'n, Ex. 6 ¶ 3. The plaintiff does not suggest that these terms were to narrow, nor does the plain-

V. Conclusion

This Court is troubled by the government's failure to timely and adequately respond to the plaintiff's FOIA request. But for the filing of this action, the DoD may never have complied with its obligations under the FOIA. "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Here, the DoD acted only with the prodding brought about by this litigation. This is not how a government agency should comply with its statutory obligations. Nevertheless, the DoD has now responded to the plaintiff's FOIA request, as it should have done earlier, and as this Court has found, the defendant has now also adequately searched for responsive documents, a search that was not conducted in bad faith. Moreover, the defendant has properly withheld documents pursuant to Exemption 5. However, the documents withheld pursuant to 10 U.S.C. § 130c have not been properly designated as exempt from public disclosure by the Secretary, and thus the defendant has not properly invoked Exemption 3. Nevertheless, this Court will afford the defendant the opportunity to correct its flawed assertion of Exemption 3, and permit it to refile a renewed summary judgment motion before definitively concluding that Exemption 3 has been improperly invoked.

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tiff provide other terms it believes would have been more appropriate. And this Court can think of none. What the plaintiff is advancing is nothing more than pure speculation.

SO ORDERED this day of 16th day of December, 2005.[15]

REGGIE B. WALTON
United States District Judge

[15] An Order consistent with the Court's ruling accompanies this Memorandum Opinion.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5242

September Term 2007

04cv00312

Filed On: April 30, 2008

National Institute of Military Justice,
Appellant

v.

Department of Defense,
Appellee

BEFORE: Henderson and Tatel,* Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing filed on February 25, 2008, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* Circuit Judge Tatel would grant the petition for rehearing.

Supreme Court, U.S.
FILED
NOV 12 2008
OFFICE OF THE CLERK

No. 08-125

In the Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,
PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that communications from a small group of former government officials and academics, who were individually and directly solicited by an agency for their expert advice and who were neither self-advocates nor advocates for others, constituted "inter-agency or intra-agency" communications exempt from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

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In the Supreme Court of the United States

No. 08-125

NATIONAL INSTITUTE OF MILITARY JUSTICE,
PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 512 F.3d 677. The opinion of the district court (Pet. App. 41a-87a) is reported at 404 F. Supp. 2d 325.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2008. A petition for rehearing was denied on April 30, 2008 (Pet. App. 88a). The petition for a writ of certiorari was filed on July 29, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 13, 2001, shortly after the September 11 terrorist attacks, President Bush ordered the

Department of Defense (Department or DoD) to establish military commissions to try terrorists—defined as non-citizens who the President determines are members of al Qaeda, have engaged in acts of international terrorism, or have knowingly harbored such persons. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 3 C.F.R. 918 (2002). In the course of promulgating regulations to carry out the Presidential directive, the Department of Defense "solicited and received comments from a number of non-governmental lawyers, who were former high ranking governmental officials or academics or both," Pet. App. 3a, and whose "previous experience in the government and/or their expertise made them uniquely qualified to provide advice" to the Department with respect to procedures for the envisioned military commissions, *id.* at 4a (citation omitted).[1] Those individuals were not paid for their services, but there was an understanding that they would be consulted on a continuing basis and that the contents of their advice "would not be released publicly." *Ibid.* (citation omitted).

Petitioner filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, with the Department seeking "all written or electronic communications" between the Department and any person who was not an officer or employee of the United States concerning the President's order, including but "not limited to suggestions or comments on potential, proposed, or actual terms of any of those Orders or Instructions and any

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[1] Those whose views the Department solicited included, *inter alios*, individuals who had served as Legal Counsel to the President, Director of the CIA and FBI, Secretary of the Army, Department of Defense General Counsel, and Assistant Trial Counsel at the Nuremberg war crimes tribunal. Pet. App. 14a & n.8.

similar, subsequent, superseding or related Orders or Instructions, whether proposed or adopted." Pet. App. 4a-5a. The Department released thousands of pages of responsive documents, including documents containing views submitted by "individuals who were 'not consulted with on a continuing basis or with the understanding and expectation that their comments would be kept in confidence.'" *Id.* at 4a n.3 (citation omitted); see *id.* at 13a (noting that the Department did not claim exemption for comments from "members of the public or organizations *with an interest in these matters*"). The Department withheld from disclosure, pursuant to FOIA Exemption 5, nineteen documents relating to the views of individuals the Department had specifically solicited with an understanding that they would be consulted on an ongoing basis and that their advice would remain confidential. *Id.* at 5a, 44a. Exemption 5 exempts from FOIA's disclosure requirement "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552(b)(5).

2. Petitioner filed this suit under FOIA in the United States District Court for the District of Columbia in February 2004, seeking disclosure of the documents the Department had withheld. The court held that, pursuant to this Court's decision in *Department of the Interior* v. *Klamath Water Users Protective Ass'n.*, 532 U.S. 1 (2001) (*Klamath*), the Department had acted appropriately in withholding the disputed documents under Exemption 5. Pet. App. 73a.[2] The court observed that

[2] Petitioner also raised other issues before the district court. Pet. App. 47a-54a (adequacy of the Department's search); *id.* at 54a-69a (FOIA Exemption 3). Those issues are not presented in the petition for a writ of certiorari.

the consultants' "comments were clearly made to advance the 'truth and [the consultant's] sense of what good judgment calls for, and in those respects [the consultant] functions just as an employee would be expected to do.'" *Id.* at 74a (brackets in original) (quoting *Klamath*, 532 U.S. at 11). The court rejected petitioner's argument that the consultants had merely advanced their personal interests, observing that the attorneys' views "were requested by the DoD" and that "[t]here is simply no evidence that any non-agency attorneys were representing their personal interests or the interests of any clients in making their comments." *Ibid.*

The district court further reasoned that withholding the documents is consistent with the purpose of Exemption 5 "to enhance the 'the quality of agency decisions.'" Pet. App. 75a (quoting *Klamath*, 532 U.S. at 9). The court concluded that the attorneys' views were solicited on a matter "of vital importance to this nation" and "would enhance the quality of the agency's decision making process." *Ibid.* The court therefore ruled that the 19 documents were exempt from disclosure under the deliberative process privilege encompassed within Exemption 5 because the recommendations "reflect the personal view of the author" and their disclosure "might very well stifle the frank and honest views of others who may in the future be asked to provide advice and guidance to the DoD." *Id.* at 79a-80a.

3. The court of appeals affirmed. Pet. App. 1a-22a. The court noted that the documents at issue were "plainly" both predecisional and part of the Department's deliberative process and therefore would qualify for withholding under the "deliberative process privilege" if, as the district court held, they were inter- or intra-agency communications. *Id.* at 6a n.4. The court held that, con-

sistent with this Court's analysis in *Klamath* and the court of appeals' prior decisions in *Ryan* v. *Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980), *Formaldehyde Institute* v. *Department of Health & Human Services*, 889 F.2d 1118 (D.C. Cir. 1989), and *Public Citizen, Inc.* v. *Department of Justice*, 111 F.3d 168 (D.C. Cir. 1997), the disputed documents were subject to withholding under Exemption 5. Pet. App. 5a-22a.

The court of appeals observed that *Klamath* had expressly noted, while reserving decision on the question, the line of circuit court precedent holding that Exemption 5 encompasses "records submitted by outside consultants [that] played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done." Pet. App. 11a (quoting *Klamath*, 532 U.S. at 10). The Court had stressed in *Klamath* that the Indian Tribes whose communications with the Bureau of Indian Affairs were at issue in that case had communicated with the Bureau "with their own * * * interests in mind" and were "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone." *Ibid.* (quoting *Klamath*, 532 U.S. at 12). The Court had distinguished such communications—which fell outside of Exemption 5—from those in the typical cases applying Exemption 5, in which the consultant's "only obligations are to truth and its sense of what good judgment calls for, * * * just as an employee would be expected to do." *Ibid.* (quoting *Klamath*, 532 U.S. at 11).

Adhering to established appellate precedent, which *Klamath* had not disturbed, the court of appeals held that the documents at issue in this case qualified as

intra-agency documents under Exemption 5.[3] The court of appeals explained that the terms "inter-agency" or "intra-agency" must be given a "common sense interpretation" so that the agency may "rely on the opinions and recommendations of temporary consultants, as well as its own employees." Pet. App. 16a (quoting *Ryan*, 617 F.2d at 789). The court observed that confidentiality "is crucial to eliciting candid and honest advice from outside consultants," *id.* at 18a, and noted that the Department had good reason to enlist expert advice in this case, as "[i]t was plainly preferable * * * for DoD to consult as widely as possible in order to fairly but effectively try terrorists in the aftermath of September 11, 2001," *id.* at 12a-13a.

The court stressed that its decisions construing the "intra-agency" requirement insist upon "indicia of a consultant relationship between the outsider and the agency," such as evidence that the "agency [sought] out the individual consultants and affirmatively solicit[ed] their advice in aid of agency business." Pet. App. 19a. Here, the Department "sought these individuals out and solicited their counsel based on their undisputed experience and qualifications." *Id.* at 13a-14a. The court emphasized that petitioner "itself concedes" that, unlike the Indian Tribes in *Klamath*, the consultants in this case "had no individual interests to promote in their submissions." *Id.* at 13a. In fact, the court noted, the Department disclosed in response to petitioner's FOIA request

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[3] The court of appeals recognized that *Klamath* expressed reservations "with regard to the potential self-interests of the 'consultants' involved" in two of the District of Columbia Circuit's prior cases, Pet. App. 17a, but observed that, in this case, "there is no dispute that the individuals DoD consulted were not pursuing interests of their own so as to run afoul of *Klamath*'s concern," *ibid.*

comments regarding the tribunals that were submitted by "members of the public or organizations *with an interest in these matters*." *Ibid.* The court rejected petitioner's contention that the absence of a consulting contract, stipend, or a nominal committee membership should be determinative. *Id.* at 13a, 20a-21a. Rather, "[i]t was DoD's formal solicitation of their advice (with or without nominal pay or title) that created a consultant relationship and made them analogous to agency employees and [made] documents containing their advice 'intra-agency.'" *Id.* 20a.

Judge Tatel dissented. Pet. App. 23a-40a. He would have limited the inter- or intra-agency requirement of Exemption 5 to communications from individuals who were formally hired as paid consultants or formally appointed to advisory committees. *Id.* at 25a, 32a. The dissent acknowledged that "[a]gencies will obtain better advice if they can promise confidentiality to outside volunteers whose views they solicit" and that "the benefits of such advice will outweigh the cost in lost transparency," but would have concluded that such communications nonetheless fall outside the scope of Exemption 5. *Id.* at 39a.

ARGUMENT

Petitioner seeks review (Pet. 12-21) of the court of appeals' determination that advice provided to an agency by a small group of former government officials and academics specifically solicited by the agency for their expertise, and who had no independent interest in the matter, constitute "intra-agency" communications within the meaning of FOIA Exemption 5. The decision of the court of appeals is correct and does not conflict with any

decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

1. The court of appeals correctly construed FOIA Exemption 5 to encompass communications between an agency and a small group of former government officials and academics who have no interest in the matter but whose advice the agency specifically solicits due to their experience and expertise. Contrary to petitioners' suggestion (Pet. 15-16), there is no reason to limit the protection of Exemption 5 to consulting relationships that comply with certain formalities, such as a paid consulting contract or formal membership on an advisory committee. It is the substance of the relationship, rather than particular formalities, that is determinative. Where, as here, the consultants have been specifically solicited to provide the agency with their disinterested expert advice, with an understanding that the relationship will be ongoing and confidential, that advice constitutes an intra-agency communication within the scope of Exemption 5.

This Court has recognized that the deliberative process privilege encompassed within Exemption 5 extends to "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks and citation omitted). The protection of such documents from disclosure "rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," and, thus, in order to enhance "the quality of agency decisions," the Exemption "protect[s] open and frank dis-

cussion among those who make them within the Government." *Klamath*, 532 U.S. at 8-9.

Petitioner does not contest that the Department's solicitation of advice to aid it in formulating procedures for the military tribunals qualifies as a "deliberative process" and therefore satisfies the second prong of Exemption 5. See Pet. App. 6a n.4. Rather, petitioner argues that, no matter how critical they were to the Department's deliberations about how best to implement the President's directive, the experts' views, though sought in confidence, categorically fall outside the scope of Exemption 5's protection because they do not qualify as "intra-agency" communications. Pet. 12-17. Contrary to petitioner's contentions, the court of appeals' holding is consistent with the text and purpose of Exemption 5 and will not lead to the consequences that petitioner hypothesizes.

Although, as this Court has noted, a narrow reading of "intra-agency memorandum" might encompass only "a memorandum that is addressed both to and from employees of a single agency," *Klamath*, 532 U.S. at 9 (quoting *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 18 n.1 (1988) (Scalia, J., dissenting)), a broader reading is more consistent with the statute's purpose. "It is textually possible and . . . in accord with the purpose of the provision, to regard as an intra-agency memorandum one that has been received by an agency, to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency—*e.g.*, in a capacity as * * * consultant to the agency." *Id.* at 9-10 (quoting

Julian, 486 U.S. at 18 n.1 (Scalia, J., dissenting)).[4] As the Court has recognized, "consultants may be enough like the agency's own personnel to justify calling their communications 'intra-agency.'" *Klamath*, 532 U.S. at 12.

Petitioner does not appear to embrace the narrowest interpretation of "intra-agency"—one limited to communications between an agency's employees—but nonetheless contends (Pet. 15) that an agency's communications with a consultant may qualify under Exemption 5 only if he or she receives compensation for the consultation under a formal contract. As the court of appeals recognized, there is nothing inherent in the nature of a consultant relationship that requires monetary compensation as a prerequisite. Pet. App. 20a. Nor is there anything in the text that mandates adherence to strict formalities, such as payment of a nominal stipend or appointment to an advisory committee. *Id.* at 21a. Rather, the determination whether there exists a consultant relationship that qualifies as "intra-agency" should be based on substance. *Id.* at 19a. The presence or absence of compensation may be a relevant consideration, but there is no basis for giving it sole, controlling weight.

Petitioner's argument ultimately rests on its assertion that without such formalistic limitations, Exemption 5 would become boundless, such that "if an agency held a press conference and asked citizens to send in advice, letters from everyone who responded would qualify as 'intra-agency.'" Pet. 16 (quoting Pet. App. 33a (Tatel,

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[4] Although Justice Scalia made his observation regarding outside consultants falling within the definition of Exemption 5 in the context of a dissenting opinion, the majority did not disagree; rather it found it unnecessary to reach the issue. See *Julian*, 486 U.S. at 11 n.9.

J., dissenting)). Notably, the court of appeals took pains to disclaim any such construction of Exemption 5. Pet. App. 19a-20a. The court noted that the Department made no attempt to invoke Exemption 5 for comments received from the public or even from solicited parties who had their own interest in the matter. *Id.* at 13a. Rather, the court's ruling was limited to communications as to which the Department had made a "formal agency solicitation of advice from a discrete group of experts" whose "previous experience in the government and/or their expertise made them uniquely qualified" to provide disinterested advice to the Department with respect to procedures for the envisioned military commissions. *Id.* at 4a, 21a (citation omitted). See *id.* at 14a n.8 (noting posts the solicited individuals had held). Petitioner's speculation that, contrary to the court of appeals' specific admonition, its opinion will lead to "absurd results" provides no basis for this Court's review of the appellate court's limited holding.[5]

2. Contrary to petitioner's argument (Pet. 13-15) the court of appeals' construction of Exemption 5 does not conflict with this Court's decision *Klamath*. As the court of appeals explained, Pet. App. 11a, the Court in *Klamath* held only that the Indian Tribes in that case did not function as impartial consultants participating in

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[5] In his dissenting opinion, Judge Tatel read the majority's opinion, as petitioner does, as holding that Exemption 5 covers "*everyone* an agency asks for advice." Pet. App. 25a. As detailed above, the majority opinion expressly disavowed such a holding. See *id.* at 20a (noting that "nothing in our cases (including today's decision) even remotely supports" the dissent's view that the court would "allow an agency merely to ask the general public for advice at a press conference or in the Federal Register and then to classify the resulting responses as 'intra-agency' documents").

the formulation of the agency's own policy but instead "necessarily communicate[d] with the Bureau with their own, albeit entirely legitimate, interests in mind" and were "self-advocates at the expense of others seeking benefits inadequate to satisfy everyone." *Klamath*, 532 U.S. at 12. Because the Tribes in *Klamath* were "obviously in competition with nontribal claimants" for scarce benefits, *id.* at 13, their advocates could not be regarded as functionally similar to agency employees, whose "only obligations are to truth and [their] sense of what good judgment calls for," *id.* at 11.

There is no suggestion in this case that the experts consulted by the Department were "self-advocates" or were "seeking benefits" for themselves or were "in competition" with others. This is not a case in which there was any "competition" for "benefits"—much less for benefits "inadequate to satisfy everyone." Rather, as the court of appeals recognized and as petitioner has conceded, the expert advice of these former government officials and experts was solicited by the Department precisely because they had "undisputed experience and qualifications" in the area and thus were uniquely qualified to aid "DoD's deliberation in promulgating regulations." Pet. App. 13a-14a. The outside consultants served a function—offering their views, based upon their wealth of experience, as to "what good judgment calls for" regarding a matter of critical public interest—that does not differ in any substantive respect from what "an employee would be expected to do." *Klamath*, 532 U.S. at 11. There is, therefore, no conflict between the decision of the court of appeals and this Court's decision in *Klamath*.

3. Petitioner does not contend that the decision of the court below conflicts with the decision of any other

appellate court. Rather, petitioner urges the Court to grant certiorari to resolve "[t]he dispute between the majority and the dissenting judge below." Pet. 12. It is well established that this Court does not grant a writ of certiorari to address intra-circuit conflicts, see *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), and, in any event, there is no intra-circuit conflict because, as the majority explained, its decision is entirely consistent with other District of Columbia Circuit cases applying Exemption 5. See Pet. App. 18a-20a.

Implicitly acknowledging that the petition does not satisfy this Court's traditional standards for granting a petition for a writ of certiorari, petitioner argues (Pet. 18) that review in this case is justified despite the absence of any conflict because "[e]very FOIA action may be brought in the District of Columbia." Pet. 18; 5 U.S.C. 552(a)(4)(B). While it is true that each FOIA requester has the *option* to bring a suit challenging the withholding of documents in the United States District Court for the District of Columbia, FOIA also provides requesters with the choice to bring suit "in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated." *Ibid.* FOIA suits outside the District of Columbia are hardly rare. Most notably, of the nine district court decisions petitioner cites (Pet. 19) as addressing advice from consultants, six arose outside the District of Columbia in districts encompassed within the First, Eighth, Ninth, and Tenth Circuits, including cases in the District of Colorado, the District of Utah, the District of Maine, the Eastern District of Missouri, and the Northern and Central Districts of California. See Pet. 19-20. Indeed, the District of Utah case cited by peti-

tioner is currently before the Tenth Circuit in *Stewart* v. *Department of the Interior*, No. 07-4200 (argument scheduled for Nov. 17, 2008), on the government's appeal of the district court's FOIA ruling. As this body of litigation indicates, there is no reason to regard the District of Columbia Circuit's decision in this case as foreclosing additional consideration in the several courts of appeals of Exemption 5's application to communications with unpaid consultants. There is no reason for the Court to depart from its traditional practice of allowing issues to be fully developed among the courts of appeals before deciding that review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-125

In the Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government's principal argument in opposing certiorari is that the court of appeals' decision is correct. It also suggests that the issue is not yet ripe for review by this Court. Both contentions are meritless. As explained in the two amicus briefs—filed by amici with broad experience in FOIA litigation—the decision below addresses an issue of very substantial importance. Review by this Court is plainly warranted.

1. The applicable statutory text is "inter-agency or intra-agency memorandums or letters." 5 U.S.C. § 552(b)(5). Although the Solicitor General refers to this language in passing, he never even attempts to square his construction of the statute with the words Congress actually used.

Nor could he. The Solicitor General contends that the statutory term "intra-agency" should be defined as follows: "any communication solicited by a government official from a private party, provided that the private party does not have 'its own interest in the matter.'" See Br. in Opp. 11. That certainly bears no relation to the plain meaning of the term, which requires that the communication originate within the government. The Solicitor General, like the majority below, is forced to ignore the statutory text to achieve the result that he seeks. Pet. 14-16.

Moreover, concluding that a communication is "inter-agency or intra-agency" only when both parties to the communication have a formal relationship with the government is not "formalistic" (Br. in Opp. 10). As Judge Tatel explained in his comprehensive dissent below (see Pet. 15-16), that requirement is necessitated by the language that Congress employed in Exemption 5. The government's distinction

between private citizens who have their "own interest" and those who are "disinterested" (Br. in Opp. 11) not only ignores the statutory language, it also would be impossible to administer (see Pet. 17). And requiring a formal link to the government means that the individual would be bound by any applicable government conflict of interest regulations. See, *e.g.*, National Security Archive Am. Br. 10.

Finally, the government errs in asserting (Br. in Opp. 9-10) that Justice Scalia's dissenting opinion in *United States Dep't of Justice* v. *Julian*, 486 U.S. 1 (1988), provides support for its position. Justice Scalia's reference to a person acting "in a governmentally-conferred capacity" plainly meant an individual having a formal relationship with the government; *Julian* itself concerned documents prepared by probation officers employed by the courts. The same is true of the Court's reference to "consultants" in *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001); the Court previously had explained that the category of communications it was addressing were those "between Government agencies and outside consultants *hired by them*" (*id.* at 10 (emphasis added)). The *Klamath* reference thus incorporates precisely the type of formal relationship that the Solicitor General claims is irrelevant.

Indeed, the decision below is directly contrary to this Court's injunction in *Klamath* that "intra-agency" is not "a purely conclusory term, just a label to be placed on any document the Government would find it valuable to keep confidential." 532 U.S. at 12. As Judge Tatel recognized (Pet. App.31a-32a & 36a), the majority below construed the provision in a manner that drains any meaning from the statutory term "intra-agency." See Pet. 18.

2. The Solicitor General does not dispute that the question presented here regarding the applicability of Exemption 5 to communications from private individuals arises frequently. See also Pet. 19-21. And he does not disagree that the question is important.

His contention is that the Court should await a circuit conflict before granting review. But the Court has granted review in FOIA actions in the absence of a conflict—in *Klamath* itself, for example. The comprehensive majority and dissenting opinions below fully explore the relevant legal principles—and the numerous district court decisions (see Pet. 19-21) illustrate the various factual settings in which the issue can arise. No further "percolation" is required.*

Moreover, the majority's decision below rests on its misinterpretation of this Court's decision in *Klamath*. It is up to this Court to correct that error. That course is especially appropriate in view of the D.C. Circuit's uniquely expansive jurisdiction over FOIA claims. See Pet. 17-18. Otherwise, a substantial proportion of FOIA claims will be adjudicated under an erroneous legal standard bearing no relationship whatever to the statutory text. This Court should intervene to prevent that result.

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* The Solicitor General suggests (Br. in Opp. 13-14) that the Court await a decision in the *Stewart* case now pending in the Tenth Circuit. But the district court's decision there rested on its determination that the private party was not disinterested. Pet. 20 (discussing *Board of County Comm'rs of Kane County* v. *Dep't of the Interior*, No. 2:06-CV-209-TC, 2007 WL 2156613 (D. Utah July 26, 2007)). The Tenth Circuit therefore is likely to resolve the case on the basis of this Court's decision in *Klamath*, without reaching the question addressed by the court below.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE NATIONAL SECURITY ARCHIVE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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IN THE

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No. 08-125

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

INTEREST OF THE *AMICUS CURIAE* THE NATIONAL SECURITY ARCHIVE [1]

The National Security Archive ("the Archive"), a non-profit independent research institute and library, has a significant interest in the appropriate application of statutory exemptions from the policy of broad disclosure of government information embodied in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Established in 1985, the Archive collects and publishes documents on topics pertaining to the national security, foreign, intelligence, and economic policies and decision making of the United States. The Archive obtains materials through a variety of methods, including requests for government disclosure pursuant to FOIA. In 2007 alone, the Archive filed 1,813 FOIA requests with 91 agencies and pursued 363 agency administrative appeals. The Archive has litigated over 20 cases challenging agency record denials based on FOIA exemptions.[2] Amicus briefs of the Archive have been considered in FOIA cases before this Court, including most recently in *Taylor v. Sturgell*, 128 S. Ct. 2161, 2177 (2008).

The efforts undertaken by the Archive to seek the disclosure of, and make available to the public, records detailing government decision making are instrumental to realizing FOIA's purpose of providing citizens with knowledge of the operations of their government and to enable public scrutiny essential to the functioning of democracy. *See Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 16 (2001) ("Congress believed [FOIA] . . . would help 'ensure an informed citizenry vital to the functioning of a democratic society'") (citation omitted); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 772-73 (1989) (FOIA's "basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' indeed focuses on the citizens' right to be informed about 'what their government is up to'") (citation omitted). In its extensive FOIA activities,

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[2] *See, e.g., Nat'l Sec. Archive v. Dep't of the Air Force*, No. 05-571 (RMG), 2006 U.S. Dist. LEXIS 21037 (D.D.C. Apr. 19, 2006); *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872 (D.D.C. 1991).

the Archive relies on the view this Court articulated in *Klamath*, specifically, the Court's guidance that the intra-agency memoranda or letters exemption, 5 U.S.C. § 552(b)(5) ("Exemption 5"), does not allow a federal agency to refuse disclosure of documents reflecting communication between the agency and a private, non-governmental party with whom it has no formal employment relationship. *Klamath*, 532 U.S. at 10-11 (limiting the "consultant corollary" of Exemption 5 to "communications between Government agencies and outside consultants *hired* by them") (emphasis added).

The 19 records sought by Petitioner containing opinions solicited by the Department of Defense ("DoD") from non-governmental lawyers to promulgate regulations under President Bush's November 2001 military order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 6 Fed. Reg. 57,833 (Nov. 13, 2001), are highly relevant to understanding national security decision making. Therefore, the Archive, on behalf of the public, has a strong interest in the disclosure of these particular documents as well as in the implications of the lower court's ruling for future FOIA requests concerning national security decision making.

In the decision below, the D.C. Circuit upheld DoD's denial of Petitioner's request for these 19 records by expanding the retained consultant corollary discussed in *Klamath* to include documents reflecting opinions from *anyone* from whom an agency chooses to solicit advice, even if there is no formal employment relationship between the advisor and a federal agency. (Pet. for Writ of Cert. App. A at 13a.) This overbroad interpretation of Exemption 5 breaks the limits set by this Court for what types of

documents will be considered intra-agency memoranda and letters. A review of FOIA request handling by 25 agencies and departments found a 95% increase in reliance on Exemption 5 as a basis for refusing disclosure of government records in the past decade. See Coalition of Journalists for Open Government, *An Opportunity Lost, Part 1, An In-depth Analysis of FOIA Performance from 1998 to 2007* 10 (July 3, 2008) (reporting 34,587 denials based on Exemption 5 in 1998 and 67,561 denials in 2007). The D.C. Circuit's decision in the case below, if left standing, threatens to encourage agencies to further expand their reliance on Exemption 5 and improperly refuse disclosure of documents the Archive will request in the future. It is strongly in the interest of the Archive, as a frequent FOIA requestor that seeks records concerning policy and decision making, for the Court to review the decision below and clarify the limits of Exemption 5.

SUMMARY OF ARGUMENT

By allowing federal agencies such as DoD to keep secret communications with selected private individuals, the D.C. Circuit has thwarted Congress's dominant policy objective behind FOIA that advances broad disclosure of government information, limited only by specifically stated and narrowly construed statutory exceptions, so as to facilitate maximum public scrutiny of government decision making. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-62 (1976) (reviewing legislative history in S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) and citing *EPA v. Mink*, 410 U.S. 73, 79-80 (1973)). The D.C. Circuit effectively has rewritten the FOIA *intra-agency* memoranda and letters exception to make documents reflecting the advice of *selected non-governmental*

private attorneys commenting on draft regulations protected from disclosure. This departure from the plain and apparent meaning of the statutory text defies the precept that FOIA exemptions be construed narrowly in favor of disclosure.

Should an agency require input from private citizens, it should follow the myriad procedures permitted under the law, including soliciting public comment or establishing a federal advisory committee. To obtain secrecy in its deliberative communications with an advisor, however, Exemption 5 protection can be attained only by entering a formal employment relationship, which would provide accountability and conflicts of interest protections. The decision below improperly allows Exemption 5 to protect the very type of closed door and special interest decision making that the transparency laws were designed to open up to public scrutiny. Thus, it creates a gaping hole in the law Congress enacted to protect the public's interest in accountable government decision making and will have a significant impact on future FOIA requests to government agencies. The Court should grant *certiorari* to clarify that communications with private persons, who owe none of the safeguarding duties of public servants, are not exempt from FOIA disclosure as intra-agency memoranda and letters.

ARGUMENT

I. The D.C. Circuit's Holding Frustrates the Objectives of FOIA and Other Open Government Laws by Permitting Federal Agencies to Receive Secret Advice from Private Parties

Public access to information concerning government activities, including the advice and views private individuals contribute to agencies, is a fundamental principle advanced by federal statutes. In refusing to disclose the comments it elicited from select private individuals, DoD drew its decision making behind closed doors in contravention of the objectives of the body of federal law promoting open and publicly accountable government.

FOIA mandates complete openness, with only carefully delineated exemptions from that general rule. *See Rose*, 425 U.S. at 360-61. In enacting the law, Congress sought to "'enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities,'" *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974) (citation omitted), and to prevent the damage that pervasive secrecy in government agencies does to public confidence. *See* S. Rep. No. 813, 89th Cong., 1st Sess., 10 (1965) ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

Similarly, under the Administrative Procedure Act ("APA"), either through informal notice-and-comment

proceedings, 5 U.S.C. § 553, or formal on-the-record rulemaking, 5 U.S.C. §§ 556, 557, agencies are directed to avail themselves of the views of interested persons and the public with transparency. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The purpose of these procedures is "to assure fairness and mature consideration of rules of general application." *Id.*

Likewise, under the Federal Advisory Committee Act ("FACA"), Congress recognized that seeking advice from private citizens can be a "useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." 5 U.S.C. App. 2 § 2. In seeking private input, however, Congress sought to protect public decision making from any inappropriate influences by legislating safeguards to ensure public scrutiny of advisory committee activities. These measures include public notice of and access to meetings, unless the President or relevant agency head determines that the meeting may be closed under exceptions set forth in the Government in the Sunshine Act, 5 U.S.C. § 552b(c). 5 U.S.C. App. 2 § 10(a)(1)-(3); (d). Also, FACA requires public availability of meeting minutes as well as documents prepared for or by advisory committees, subject to exemptions available under FOIA. 5 U.S.C. App. 2 §§ 10(b)-(c); 11; *see generally Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 446, 459 (1989) (FACA's principal purpose is to enhance accountability by allowing the public to monitor the existence, activities, and cost of advisory committees); *Animal Legal Defense Fund Inc. v. Shalala*, 104 F.3d 424, 426-27 (D.C. Cir. 1997) (FACA demands public access to documents concerning private experts selected by the National Academy of Sciences to serve on a committee advising on laboratory

standards); *Nat'l Anti-Hunger Coal. v. President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1072 (D.C. Cir 1983) (FACA is intended "to open to public scrutiny the manner in which government agencies obtain advice from private individuals") (citations omitted).

In the present case, where DoD did not engage in APA rulemaking or establish an advisory committee under FACA when it elicited the views of non-governmental lawyers on draft regulations for military tribunals, FOIA functions to ensure public accountability for decisions based on private comments. By stretching the meaning of the term "intra-agency" in Exemption 5 past its breaking point, the D.C. Circuit effectively has nullified this safeguard. It has given a green light to agencies to shroud their communications with selected private individuals in secrecy, creating a hole in the framework of federal open government laws which Congress did not intend.

II. Any Potential Benefit to Be Gained from Keeping Communication with Private Citizen Advisors in Confidence Does Not Justify the Court of Appeals' Rewriting of FOIA Exemption 5

Although, as the D.C. Circuit noted, "the expectation that communications will remain confidential is crucial to eliciting candid and honest advice from outside consultants" (Pet. For Writ of Cert. App. A at 18a), the benefit presumably derived from keeping communications secret is no license to obliterate all meaning of the term "intra-agency" from the statute. *See Klamath*, 532 U.S. at 11-12 (promotion of "frank communication" does not justify reducing intra-agency to "a purely conclusory term"). This Court

has emphasized that FOIA exemptions are intended to have a "meaningful reach and application" while achieving a "workable balance" between the public right to know and the legitimate needs of agencies to keep certain information in confidence. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152-53 (1989). In balancing the interests at stake, courts should follow "the clear provisions" of FOIA and narrowly construe any ambiguities "in favor of disclosure." *Id.* at 164 (Scalia, J., dissenting) (stating adherence to this approach will "reduc[e] the volume of litigation and mak[e] it inescapably clear to Congress what changes need to be made").

To prevent an impermissible judicial expansion of Exemption 5, the Court should grant review and articulate clear guidance on the breadth of that exemption. A requirement that agencies enter formal employment relationships with non-governmental advisors before earning Exemption 5 coverage, as posited in *Klamath*, would reduce, if not eliminate, the present uncertainty among agencies and FOIA requestors and claimants regarding the reach of Exemption 5. *See U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988) (stressing that Congress intended workable rules for determining whether particular material may be withheld or must be disclosed).

III. By Granting Exemption 5 Protection to Advice from Private Individuals, the D.C. Circuit Encourages Avoidance of Government Ethics Laws, Reducing Recourse for Seeking Public Accountability

If an agency believes it must assure confidentiality to obtain candid advice from private individuals, the

agency may hire them, with or without pay, and bring them within the agency to achieve Exemption 5 protection from disclosure of related documents. Under current federal regulations, an individual "retained, designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period" is considered a "special Government employee." *Standards for Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. 2635.102(l) (following the definition codified at 18 U.S.C. § 202(a)). Once engaged in a formal employment relationship with a federal agency, special government employees are obliged to act in service of the public by adhering to the principles of ethical conduct set forth in 5 C.F.R. 2635, including conflict of interest and disqualification provisions, as well as fulfill financial disclosure obligations depending on level of pay and expected time commitment of position in accordance with 5 C.F.R. 2634.202 and 2634.204. Furthermore, special government employees fall under the jurisdiction of federal bribery and conflict of interest criminal statutes. *See, e.g.*, 18 U.S.C. §§ 201, 203, 205, 207, 208, 209. Thus, when agencies establish formal employment relationships with advisors, despite the possible unavailability of information to the public through FOIA, Congress has put in place other mechanisms to ensure that individuals who advise the government act with commitment to the public interest.

Here, however, the private individuals from whom DoD solicited and obtained advice owed none of the obligations owed by government employees. In this circumstance, disclosure of that advice is mandated under FOIA to enable government accountability to

the public for the decisions it made based on that advice. By obviating formal engagement of an outside advisor to ensure Exemption 5 protection, the decision of the D.C. Circuit simultaneously undermines the objectives of both open government laws and government ethics laws. Review should be granted to eliminate this undesirable ethical consequence of overextending the scope of Exemption 5.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* in the above captioned case should be granted.

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IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF MILITARY JUSTICE,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act ("FOIA" or "the Act") litigation since 1970.

The Reporters Committee assists journalists in accessing information integral to the public's participation in its government, including access to federal agency records under FOIA. As "surrogates for the public," *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), journalists need unfettered access to all information, including records relating to the influences of outside consultants, that sheds light on government performance. .

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amicus curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the amicus made a monetary contribution to the preparation and submission of this brief; that counsel for both parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amicus curiae* has been filed with the Clerk.

SUMMARY OF ARGUMENT

Congress enacted the Freedom of Information Act to shed light on the inner workings of government and pierce the veil of administrative secrecy that is detrimental to creating a responsive and accountable government. In this case, the Petitioner used FOIA to request records created by non-governmental attorneys who were solicited by the Department of Defense to offer recommendations relating to the creation of military commissions. If disclosed, the attorneys' records would supply unique insight into the formation of military commissions that ultimately led to years of costly litigation and the eventual invalidation of the commissions as they existed in 2006. The lower courts agreed with the government in this case that the requested records could be withheld citing FOIA's Exemption 5. But the lower courts' analyses as to whether the attorneys' communications constituted "inter-agency" or "intra-agency" records is incomplete, because the attorneys' potential self-interests were not sufficiently evaluated. Because this Court has ruled that this type of in-depth analysis is required in Exemption 5 cases, the petition should be granted and the lower court's decision ultimately reversed.

ARGUMENT

I. FOIA EXEMPTIONS MUST BE APPLIED NARROWLY TO ENSURE THAT THE ACT'S CENTRAL PURPOSE IS FULFILLED.

A. FOIA Provides Broad Access to Federal Agency Documents.

The Freedom of Information Act was designed to facilitate the public's ability to monitor and evaluate federal agencies. As Congress noted when the Act was created, FOIA's purpose is "to establish a general philosophy of full agency disclosure." S. Rep. No. 89-813, at 38 (1965). In signing the bill into law, President Lyndon Johnson noted that a democracy works best when the public is privy to more information concerning its government rather than less: "No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest." Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, 2 Weekly Comp. Pres. Doc. 895 (July 4, 1966).

During the more than forty years since FOIA's enactment, this Court has repeatedly recognized that Congress intended the Act to be an instrument for shedding light on the federal government's performance. *See, e.g., Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989). In fulfilling this central purpose of showing what the "government is up to," the Act must be construed broadly in favor of disclosure. *Id.* at 773. More spe-

cifically, the Court has viewed FOIA as a tool for holding the government accountable by dissolving the walls of secrecy. As the Court noted, FOIA was enacted to "[t]o make clear the congressional objective ... to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361(1976) (*internal quotations omitted*).

To serve the Act's overriding interest in providing broad access to government documents, this Court has acknowledged that FOIA's exemptions must be interpreted narrowly. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001) (citing *Rose* at 425 U.S. at 361 (holding that exemptions are "limited"); *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (recognizing that given FOIA's "goal of broad disclosure, these exemptions have been consistently given a narrow compass"); and *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (finding that "FOIA exemptions are to be narrowly construed)). This Court has recognized that FOIA was originally conceived to default in favor of disclosure. As it noted in *Rose*, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." 425 U.S. at 361.

B. In this Case, this Court can Clarify a Significant Area of Freedom of Information Act Law.

The Act's Exemption 5 permits federal agencies to withhold "interagency or intra-agency memoranda or

letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify for the exemption, the records must also be deliberative and pre-decisional. *Klamath*, 532 U.S. at 8-9. In *Klamath*, this Court found that letters submitted by Indian tribes to the Department of the Interior were not exempt from disclosure because the tribes had been acting explicitly in their own interests in filing the letters. *Id.* at 14. This Court expressly declined to rule whether Exemption 5 might apply to reports produced by third-party consultants in other circumstances. *Id.* at 12.

In this case, Petitioner seeks to obtain through FOIA records of communications between Department of Defense ("DoD") personnel and members of the public relating to the Military Order ("the Order") signed by President Bush on November 13, 2001. *Nat'l Inst. of Military Justice v. Dep't of Defense*, 512 F.3d 677, 678-79 (D.C. Cir. 2008); Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). The Order authorized the establishment of military commissions to try suspected terrorists. *Id.* Petitioner has also requested documents relating to DoD's subsequent implementing orders and regulations related to the Order. *Id.* In rejecting the Petitioner's records request, the DoD claims that the requested records, which feature non-governmental attorneys' opinions and recommendations, may be withheld from disclosure through Exemption 5 because the records qualify as "intra-agency or inter-agency" documents. *Id.* The DoD argues that in the absence of a consultant's clearly identified self-

interest, D.C. Circuit precedent authorizes records with pre-decisional, deliberative content to be withheld through Exemption 5. *Id.*

The D.C. Circuit Court in this case agreed with the DoD and found the records at issue could be withheld through Exemption 5, despite the fact that the attorneys' relationship with the agency was not memorialized through a formal contract and the attorneys are not public officials. *Id.* The circuit court held that *Klamath* did not control the outcome in this case, because the attorneys' interests in soliciting their comments were not identified. *Id.* The lower court instead relied upon its own precedent in finding that records submitted by non-agency parties in response to federal agency requests can be withheld. *Id.* at 681.

The Petitioner has conceded and the circuit court has found that there is no persuasive evidence that the non-governmental attorneys in this case were motivated by their own personal interests to submit their comments to the DoD. *Id.* at 683. But even if the attorneys' interests were not sufficiently identified to trigger the rule from *Klamath*, neither is it sufficiently clear by the facts in this case that the attorneys' comments were absolutely *not* motivated by their self-interests. *See id.* The lack of a formal, contractual relationship between the DoD and the attorneys, along with the attorneys' status as private citizens rather than as public officials makes it inherently difficult to discern what, if any, interests the attorneys may have represented.

D.C. Circuit Court Judge David S. Tatel's dissent acknowledged this key point in arguing that the majority has in essence ignored the analysis of potential interests that this Court instituted through *Klamath*. As Judge Tatel noted, the majority has seemingly adopted a rule for Exemption 5 cases that views "intra-agency" as a "purely conclusory term." *Id.* at 690-91 (Tatel, J., dissenting) (citing *Klamath*, 532 U.S. at 12). Without a more in-depth analysis of a given consultant's potential interests, the circuit court's rule allows an intra-agency or inter-agency "label to be placed on any document the Government would find it valuable to keep confidential." *Id.*

In granting this petition, the Court has an opportunity to clarify the reach of Exemption 5, and, most importantly, correct the D.C. Circuit's rule, which injects a degree of ambiguity into what constitutes an intra-agency or inter-agency communication that is inconsistent with both the *Klamath* decision and Congress' intent for broad disclosure under FOIA. *See supra* Part I.A. If the circuit court's rule on this issue is permitted to stand, federal agencies will continue to withhold documents with little or no regard for the potentially significant interests represented by the private citizens by whom agencies can be influenced. This Court should make clear the narrow circumstances by which Exemption 5 may be applied and, in so doing, ensure that such records are available for public scrutiny.

II. AN OVERLY BROAD INTERPRETATION OF FOIA'S EXEMPTION 5 DRAMATICALLY HINDERS OVERSIGHT OF FEDERAL AGENCIES.

A. The Press has Often Used FOIA to Obtain Records Produced by Third Parties Hired by the Government to Assess Government Performance.

A crucial function of the press is to maintain a close eye on government decision-making, taking care to scrutinize the process by which public officials spend taxpayers' money and act on the public's behalf. In fulfilling this watchdog role, the press is often dependent on FOIA as an invaluable tool to uncover government waste, corruption, and ineptitude. Because such transgressions often leave a paper trail, the public is better served when the press has full, unobstructed access to government documents.

In many cases, this paper trail begins with the work of third-party consultants who have either been hired by the federal agencies to assess government performance or who have been solicited without compensation to provide expertise and insight to government decision makers. In their own investigations, reporters routinely depend upon the objective analysis provided by such consultants.

For example, the *St. Louis Post-Dispatch* recently used FOIA to obtain an independent contractor's report that found the National Park Service ("NPS") to be partly at fault for a tram cable that snapped within the Gateway Arch in St. Louis. Todd C.

Frankel, *Why did this Cable at the Arch Break?*, St. Louis Post-Dispatch, Aug. 8, 2008, at A1. While no one was injured when the braided steel cable plummeted more than 500 feet within the national historic landmark on July 21, 2007, experts said the falling cable had the potential to cut through metal "like a knife through butter." *Id.* The ensuing investigation culminated in a report produced by a Pennsylvania engineering firm, which found workmanship by the NPS to be partly to blame for the near-disaster. *Id.* While there is no evidence that the NPS attempted to withhold the report or otherwise cover up the report's criticisms, the *Post-Dispatch* report shows the availability of FOIA absolutely ensured the valuable report's public release. *Id.*

In 2005, a newspaper's FOIA request for consultant-produced documents led to one of the more eye-opening and disturbing stories of the current Iraq War. The *Marine Corps Times* used FOIA to obtain an outside consultant's memoranda to the Marine Corps that recommended body armor vests being issued to American soldiers be replaced. Christian Lowe, *Flawed Body Armor*, Marine Corps Times, May 16, 2005, at 22. By obtaining the memoranda, the newspaper showed the Marine Corps had disregarded the recommendations, which were later validated by another government agency, and left American soldiers vulnerable while in combat. *Id.* As a result of the *Marine Corps Times* story, the Marine Corps recalled more than 5,000 of the ineffective body armor vests. *Id.*

In 2004, the *Charleston Gazette* obtained a consultant's report that found U.S. Mine Safety and

Health Administration ("MSHA") officials had been ignoring large scale safety concerns through inadequate mine inspections. Ken Ward, Jr., *Mine Agency Misses 'Systematic' Problems, Study Says*, Charleston Gazette, Nov. 9, 2004, at 1D. The *Gazette* asserted that the agency only released the report that was drafted by a consultant's firm hired by MSHA once the newspaper filed a FOIA request. *Id.*

The examples above are just a brief snapshot of how FOIA has been used to obtain consultants' documents that otherwise might have been locked away from public view. Because the reports and memoranda were all produced by third-party consultants hired by federal agencies for purposes unrelated to the consultants' interests, the reports could have arguably been withheld by applying an overly broad interpretation of FOIA's Exemption 5. The examples above show the public has been better served by a narrow interpretation that leads to disclosure of consultants' documents, thereby permitting journalists to properly perform their important oversight function.

B. The Public has a Right to Know About the Process and Influences by Which the Bush Administration's Illegitimate Military Commissions were Devised.

The Bush Administration's attempts to create fair and just military commissions to try detainees held in Guantanamo Bay, Cuba, were arguably a failure. After years of litigation derived from challenges over the commissions' legitimacy, this Court ruled in

Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that the commissions were unauthorized by federal statutes and violated international law.

Given the tremendous resources that were expended by the federal government to create the military commissions and then defend the commissions' legitimacy through litigation, the American people deserve to know how and why the administration created the commissions in the first place. By withholding the identities and communications of the individuals who may have influenced an outrageously flawed episode of policy making, the DoD has overtly excluded the public from the process, precluding any oversight concerning the commissions and their creation. Furthermore, if such communications are permitted to be withheld, the DoD will have little incentive in the future to avoid the influence of the individuals who may have played a part in creating the failed military commissions.

CONCLUSION

The public has a right to scrutinize the government decisions made in its name, for its benefit and with its tax dollars. As in this case, where the interests and influence of non-governmental consultants are ambiguous and not identified through a formal, contractual relationship, the communications between such consultants and public officials should be disclosed to the public, as Congress intended by enacting FOIA. The petition for a writ of certiorari filed by the National Institute of Military Justice should be granted.

Respectfully submitted,

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